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IN THE SUPREME COURT OF THE UNITED STATES

ALAN CROGAN, CHIEF PROBATION OFFICER, and THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioners,

v.

DARREN DAVID CHAKER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BONNIE M. DUMANIS
San Diego County District Attorney
JESUS RODRIGUEZ
Assistant District Attorney
KIM-THOA HOANG
Deputy District Attorney
KELLY M. RAND
Deputy District Attorney
330 W. Broadway, Suite 920
San Diego, CA 92101
Telephone: (619) 685-6535
Fax: (619) 515-8632

Counsel for Petitioner Alan Crogan, Chief Probation Officer

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
STEVEN T. OETTING
Deputy Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
Counsel of Record
State Bar No. 72556
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2275
Fax: (619) 645-2271
Counsel for Petitioner The People of the State of California

QUESTION PRESENTED

Whether California Penal Code section 148.6, which makes it a misdemeanor to file a knowingly false complaint of misconduct against a peace officer, impermissibly discriminates based on the content of the speech in violation of the Free Speech Clause of the First Amendment.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ALAN CROGAN, CHIEF PROBATION OFFICER, and
THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioners,

v.

DARREN DAVID CHAKER, *Respondent*.

Alan Crogan, Chief Probation Officer, and The People of the State of California, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 428 F.3d 1215. Petition Appendix ("App.") at 2a-26a. Its order denying rehearing en banc is unreported. App. at 1a. The order of the United States District Court for the Southern District of California denying the petition for writ of habeas corpus is unreported. App. at 27a-107a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on November 3, 2005. An order denying Petitioners' petition for rehearing en banc was filed on December 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law. . . abridging the freedom of speech . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part that no state "shall deprive any person of life, liberty, or property, without due process of law . . . ."

California Penal Code section 148.6 (a)(1) provides in relevant part: "Every person who files any allegation of misconduct against any peace officer, . . . , knowing the allegation to be false, is guilty of a misdemeanor."

STATEMENT OF THE CASE

1. In 1996, Respondent Darren David Chaker was arrested by City of El Cajon Police Detective Bill Bradberry for theft of services for retrieving his car from a mechanic without paying for the repairs. Some months later, Chaker filed a claim for damages with the City of El Cajon alleging Detective Bradberry injured him during the arrest by hitting him in the ribs, twisting his wrist and failing to secure him in the police car after the arrest. Nearly a year after the arrest, Chaker sent a letter to the City of El Cajon Police Department, Internal Affairs Division, making the same complaint against Detective Bradberry. The letter was signed under penalty of perjury.

Based on the letter Chaker sent to the Internal Affairs Division of the El Cajon Police Department, the San Diego County District Attorney charged Chaker in a misdemeanor criminal complaint with filing a knowingly false allegation of misconduct against Detective Bradberry in violation of California Penal Code section 148.6 (a)(1). A jury found Chaker guilty of the charge and the court sentenced him to two days

custody with credit for time already served, fifteen days of public service, and three years of informal, unsupervised probation. The court also ordered Chaker to pay a fine and restitution totaling $1,142.

2. Chaker appealed (but did not raise a First Amendment claim) and the Appellate Department of the San Diego Superior Court affirmed his conviction. Chaker later filed a petition for writ of habeas corpus in the superior court and two such petitions in the California Supreme Court, first claiming ineffective assistance of counsel and, later, denial of self-representation. Each of these petitions was denied.

3. Chaker filed a petition for writ of habeas corpus in the federal district court, invoking its jurisdiction under 28 U.S.C. § 2254. While this petition was pending, Chaker filed a third habeas corpus petition in the California Supreme Court which raised, for the first time, a First Amendment challenge to California Penal Code section 148.6 (West Supp. 2006). The state supreme court denied the petition for procedural reasons. (The California Supreme Court later considered on the merits and rejected a First Amendment challenge to section 148.6 in *People v. Stanistreet*, 29 Cal. 4th 497, 58 P.3d 465, 127 Cal. Rptr. 2d 633 (2002), *cert. denied, sub nom., Stanistreet v. California*, 538 U.S. 1020 (2003).) Chaker was then permitted to amend his federal petition to include the First Amendment claim.

4. On September 24, 2003, the district court filed an order denying Chaker's amended petition for writ of habeas corpus. App. at 27a-107a. The court considered Chaker's First Amendment challenge to section 148.6 based upon an "independent review of the record" because there was no reasoned state court decision on the claim. App. at 40a-41a. The district court rejected the First Amendment challenge, finding that section 148.6's content discrimination within a proscribable area of speech fit within the first of the three categories set out in this Court's opinion in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), namely, that the basis for the content discrimination

consists entirely of the very reason the entire class of speech at issue is proscribable. The court rejected Chaker's contention that the only permissible reason why the speech punished by section 148.6 is proscribable is due to the injury flowing from defamatory speech. The court found that the California Legislature had recognized as a justification for the statute that unscrupulous citizens had taken advantage of the open and available citizen complaint procedures, which the Legislature had previously put into place (*see* Cal. Penal Code § 832.5 (West Supp. 2006)), by filing false and malicious complaints in an effort to punish officers for doing their jobs. These false complaints had the effect of detracting from the goal of providing greater accountability of police conduct which the mandatory citizen complaint procedures sought to promote. App. at 54a-57a. The court concluded that this rationale is the same reason the entire class of speech concerned is proscribable, namely, that knowingly false allegations of peace officer misconduct hampers the state's ability to promote greater accountability of peace officers' use of police power. App. at 60a.

5. On November 3, 2005, a three-judge panel of the Ninth Circuit issued an opinion reversing the district court and directing issuance of the writ. App. at 2a-26a. In an opinion authored by Circuit Judge Pregerson, the Ninth Circuit held that the California statute violated the Free Speech Clause. While acknowledging that the state may prohibit knowingly false speech made in connection with the peace officer complaint process, it found that the state could not punish false speech that is *critical* of a peace officer and not also punish false speech that is *supportive* of a peace officer in the misconduct investigation process. Thus, the court concluded that section 148.6 was "underinclusive" and runs afoul of the Free Speech Clause because it singles out certain speech for opprobrium based on the speaker's "viewpoint." App. at 24a. The court did not consider whether the statute came within any of the three exceptions set out in *R.A.V.*, 505 U.S. at 387-90.

6. On December 7, 2005, the court denied Crogan's petition for rehearing and rehearing en banc. App. at 1a.

7. On January 31, 2006, the Ninth Circuit granted Crogan's and the People's motion for a stay of the mandate until this Court's final disposition of this matter.

REASONS FOR GRANTING THE WRIT

One of the most vexing, yet critical, subjects in our system of ordered liberties lies at the intersection of those categories of speech cast from the temple of the First Amendment — "fighting words," defamation and obscenity — and government efforts to regulate such speech. In *R.A.V.*, the Court acknowledged that although such speech may be regulated, these categories of speech are not rendered "entirely invisible to the Constitution, so that they may be made the vehicle for content discrimination unrelated to their distinctively proscribable content." *R.A.V.*, 505 U.S. at 383-84. In doing so, the Court held that the Free Speech Clause's prohibition against content discrimination is not absolute and applies differently to proscribable speech than to fully protected speech. The Court held that even a content-based statute will survive First Amendment scrutiny if it appears that there is no effort by the government to drive certain ideas or viewpoints from the marketplace. *Id.* at 387. Chalking the sidelines of the relevant Free Speech Clause playing field, the Court then set forth three categories for the lower courts to consider in determining whether a particular content-based regulation survives First Amendment scrutiny: (1) when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable; (2) the content-defined subclass of regulated speech happens to be associated with particular "secondary effects" of the speech; and (3) other bases where the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. *Id.* at 388-90.

In California, starting with the Rodney King incident in 1991, law enforcement agencies throughout the state revised their citizen complaint procedures, which are mandated by California Penal Code section 832.5, to promote greater accountability on the part of line police officers. California Penal Code section 832.5 requires every agency in the state that employs a peace officer to establish procedures to investigate complaints by the public against personnel, to make a written description of the complaint process available to the public, to make reports and findings in misconduct investigations, and to retain these reports for at least five years.

However, a glaring negative side-effect of these reforms was that a large percentage of false misconduct reports were filed maliciously by citizens to punish officers for simply doing their jobs. One of California's largest law enforcement agencies, the Los Angles County Sheriff's Department, reported to the Legislature that of over 500 complaints filed with the department, 60 to 70 percent were determined after investigation to be unfounded. *People v. Stanistreet*, 29 Cal. 4th at 502-03. These false reports of misconduct divert precious law enforcement resources, thus detracting from the objective of curbing police abuse. Additionally, even a false report affects an officer's promotion and pay until cleared. Further, false reports are employed by criminal defendants in an effort to discredit officers who will testify against them, as these reports are commonly available in criminal discovery in the state. Against this backdrop, the Legislature enacted section 148.6 in an effort to curb a perceived rising tide of knowingly false complaints of peace officer misconduct. *Id.*

The Ninth Circuit has now taken the grave step of striking down this statute which plays a vital role in assuring the integrity of the state's effort to promote peace officer accountability through the statutorily-mandated complaint process. Without the measure of integrity fostered by section 148.6, the resources dedicated to ensuring peace officer accountability will be overtaxed and the very process will be

eroded by cynicism and waste. Further, similar statutes in at least six other states would be struck down under the circuit court's reasoning.

The Ninth Circuit's decision creates a genuine and intolerable conflict with the California Supreme Court's unanimous decision in *Stanistreet*, which found that section 148.6 passes First Amendment scrutiny because it satisfies all three categories set out in *R.A.V.* Indeed, the state court noted, rather than driving ideas from the marketplace, the state statutory scheme actually encourages complaints of peace officer misconduct, and hence such speech, with the exception of *knowingly false* complaints, is "*favored*." *People v. Stanistreet*, 29 Cal. 4th at 510.

The Ninth Circuit's decision also conflicts with this Court's decision in *R.A.V.* The circuit court struck down the statute merely because it found that section 148.6 discriminates by punishing a false complaint of misconduct, what it characterized as false speech "*critical*" of a peace officer, but does not also punish a false witness statement in the course of a misconduct investigation, which it characterized as "*supportive*" of a peace officer. However, as this Court has made clear, the determination that a statute discriminates based on the content of otherwise proscribable speech is only the first step in the constitutional analysis. Once that determination is made, a court is required under *R.A.V.* to determine whether such a statute passes constitutional muster because it satisfies one of the three categories set out in that decision. The Ninth Circuit failed to engage in this analysis. Thereby, its decision conflicts with this Court's precedent and threatens to erode it.

The premise of the Ninth Circuit's opinion — that section 148.6 discriminates unconstitutionally on the basis of viewpoint because it regulates speech "*critical*" of a peace officer while no state statute punishes false statements "*supportive*" of the officer — fails for many reasons. First, the premise mistakenly assumes that filing a misconduct allegation that requires investigation, reporting, and record-keeping, with its attendant

burdens, is no more grave than a false report or statement in the course of an ongoing misconduct investigation. The circuit court simply ignored legislation adopted by states for more than half a century which has made this exact distinction. Second, the Ninth Circuit failed to consider that section 148.6 serves only to regulate and ensure the integrity of the process of initiating a police misconduct investigation, a "special forum" the state has created to ensure police accountability. To the extent that the statute acts only on this "special forum" of expression, the state should have the ability to enact reasonable regulations bearing on this process. Third, the Ninth Circuit erred in finding "viewpoint discrimination." A "viewpoint" is based on the specific motivating ideology, opinion or perspective of the speaker. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Section 148.6 reaches only a knowingly false assertion of fact, which is decidedly not a "viewpoint."

A. The Ninth Circuit Has Decided An Important Federal Question In Direct Conflict With A Decision Of The California Supreme Court

1. In *People v. Stanistreet*, 29 Cal. 4th 497, two defendants convicted of violating section 148.6 challenged the constitutionality of the statute under the First Amendment, arguing it violates the Free Speech Clause because it proscribes knowingly false accusations of misconduct against peace officers only and not against others. The California Supreme Court noted the section does not apply to all accusations of misconduct against peace officers, but only to complaints filed with a law enforcement agency in a manner that legally obligates the agency to investigate the complaint, file a report and retain records under California Penal Code section 832.5. The court confronted section 148.6 as if it discriminates on the basis of content because it applies to false allegations only against peace officers and not others. Applying the three

categories of *R.A.V.*, the state supreme court found that the statute survives constitutional muster.

The court found the statute satisfied the first *R.A.V.* category because the very reason the entire class of knowingly false statements of fact is proscribable has "special force" when applied to false allegations of misconduct which are filed against peace officers because the filing mandates investigation, reporting and record retention. Thus, the harm of a knowingly false statement in this special context is far greater than in other situations. Echoing the words of this Court, the California Supreme Court wrote, "'The State's desire to redress perceived harms provides an adequate explanation for its' criminalizing these particular false statements of fact 'over and above mere disagreement with the offenders' beliefs or biases.' (*Wisconsin v. Mitchell*, 508 U.S. 476, 488 [1993].)" 29 Cal. 4th at 508-09.

Next, the California Supreme Court held that the statute satisfied the second category of *R.A.V.* because the particular subclass of proscribable speech — knowingly false allegations filed against peace officers — is associated with certain "secondary effects" such that the regulation is justified without reference to the content of the speech. Specifically, the mandated investigation, reporting and record keeping have substantial effects in that they waste public resources, adversely affect the officer's career, and are subject to misuse in criminal prosecutions. 29 Cal. 4th at 509.

The state supreme court concluded, under the third, catch-all, category of *R.A.V.*, that section 148.6 regulates only knowingly false allegations of misconduct within a system that actually encourages citizens to report misconduct, thus such speech is "favored." Therefore, the statute did not pose a realistic possibility that official suppression of ideas is afoot. The court noted that the statute does not suppress genuine complaints of police officer misconduct, only knowingly false ones. 29 Cal. 4th 509-10.

2. The Ninth Circuit found section 148.6 constitutionally flawed based on its finding that the statute discriminates on the

basis of "viewpoint." The federal court failed to confront the *Stanistreet* decision precisely because the circuit court failed to apply the *R.A.V.* categories in its decision. However, there can be no doubt that the Ninth Circuit decision conflicts with both the reasoning and result of the California Supreme Court's *Stanistreet* decision. In finding that section 148.6 satisfied *R.A.V.*'s three categories, the California Supreme Court necessarily held that section 148.6 does not impermissibly discriminate on the basis of "viewpoint," for viewpoint discrimination is but a form of content discrimination. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. at 829. The Ninth Circuit held exactly to the contrary.

3. This conflict between the state supreme court and the federal circuit is true, permanent, genuine and current. The trial and appellate courts in California are bound to follow *Stanistreet*, *see Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (1962) (inferior state courts are bound by decisions of the California Supreme court), rather than the Ninth Circuit's *Chaker* opinion. *People v. Bradley*, 1 Cal. 3d 80, 86, 460 P.2d 129, 81 Cal. Rptr. 457 (1969). On the other hand, the federal district courts in California and other Ninth Circuit panels will be bound to follow *Chaker* as binding "circuit precedent." *See U.S. v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005).

The conflict is also intolerable. The Ninth Circuit's decision has cast a cloud over the application and enforceability of an important state penal statute. The integrity of the peace officer misconduct reporting system erected by California Penal Code section 832.5 has been compromised. The Los Angeles District Attorney's Office, the largest district attorney's office in the state, as well as other major district attorney offices in the state, has advised the law enforcement agencies in its jurisdiction that attempts to enforce section 148.6 may result in federal civil rights liability for an officer who arrests for a violation of the statute. Despite the contrary state supreme court decision, this is a legitimate concern as the Ninth Circuit

appears to look only to federal precedent, and not to state court decisions, in determining what is "clearly established" law for purposes of federal civil rights liability and immunity. *See Motley v. Parks*, 432 F.3d 1072, 1083-88 (9th Cir. 2005); *U.S. v. Knights*, 219 F.3d 1138, 1143-44 (9th Cir. 2000).

B. The Ninth Circuit Has Decided An Important Federal Question In A Way That Conflicts With This Court's Decision In *R.A.V.*

1. Although the Ninth Circuit's decision purports to follow and apply this Court's decision in *R.A.V.*, the Ninth Circuit ignored essential aspects of *R.A.V.*, specifically the three categories which render content regulation permissible under the First Amendment. There is no mention of the three *R.A.V.* categories in the Ninth Circuit's analysis of the constitutionality of the statute and the circuit court did not address the conclusion of the district court and the California Supreme Court that the statute fits within at least one of these categories, thereby preserving its constitutionality. Thus, the Ninth Circuit decision conflicts with this Court's decision in *R.A.V.* and erodes that precedent.

2. In addition, the Ninth Circuit based its conclusion that section 148.6 was unconstitutional by applying an "underinclusiveness" test, a test this Court rejected in *R.A.V.* Although recognizing that this Court had held in *R.A.V.* that there is no general First Amendment prohibition on the underinclusive regulation of otherwise proscribable speech, *R.A.V.*, 505 U.S. at 387, the Ninth Circuit adverted exclusively to an underinclusiveness analysis based upon the notion there is a suspect exemption of certain speech from the reach of the statute — speech "*supportive*" of a police officer. The court erected a premise that all false reports or statements concerning allegations of peace officer misconduct, whether the initial false allegation which prompts an investigation *or* a false statement in the course of such an investigation, are equally pernicious and deserving of regulation. Because section 148.6 punishes

only reports "*critical*" of a peace officer and *exempts* from regulation false statements "*supportive*" of a peace officer after he is accused of misconduct, the Ninth Circuit concluded the statute discriminates on the basis of "viewpoint." The circuit court's premise is itself fallacious, as is discussed below. Moreover, the circuit court's suspect exemption analysis is wholly inapposite.

R.A.V. conclusively ruled out "underinclusiveness" as a basis for examining regulation of *proscribable* speech. *R.A.V.*, 505 U.S. at 387. However, all of the three decisions relied upon by the Ninth Circuit in its suspect exemption analysis are cases involving *fully protected* speech. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (statute prohibited expression of political views after announcement of judicial candidacy, but excluded from such regulation statements made before announcement or after election to the bench); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (regulation prohibited homeowner's yard sign expressing a political view, but exempted other specified residential signs); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (statute prohibited newspaper or mass media, but exempted other media, from distributing name of a sexual assault victim). Thus, the circuit court's suspect exemption analysis is flawed as it has no place in the analysis of a regulation affecting only otherwise proscribable speech. Indeed, as Justice Scalia, writing for the Court, noted in *Republican Party of Minn.*, "'[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon *truthful speech*, when it leaves appreciable damage to that supposedly vital interest unprohibited.'" 536 U.S. at 780 (emphasis added). By engrafting this Court's fully protected speech "underinclusiveness" or suspect exemption principles to a case involving regulation of proscribable speech, the Ninth Circuit has decided a case in manner which conflicts with this Court's decisions and in a manner which dilutes that precedent.

Moreover, the "speech" regulated by section 148.6 — a knowingly false allegation of fact — is more egregious than

even proscribable defamation as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which requires only reckless indifference to the truth. As this Court has stated, "[u]nder the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). On the other hand, this Court has recognized that selective regulation of certain species of proscribable speech, like "fighting words," can impact expression of particular ideas. *R.A.V.*, 505 U.S. at 394. Thus, in *R.A.V.* and *Virginia v. Black*, 538 U.S. 363 (2003), this Court struck down state efforts to regulate certain "fighting words" or expressive acts, e.g., cross burning, because they "impose[d] special prohibitions on those speakers who express views on disfavored subjects." *R.A.V.*, at 391. However, as the California Supreme Court mused, "[a]rguably, knowingly false statements of fact, unlike fighting words, *are* worthless and undeserving of constitutional protection." *People v. Stanistreet*, 29 Cal. 4th at 507. This Court would seem to agree , as it has stated that "the use of a lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison v. State of La.*, 379 U.S. 64, 75 (1964). All of this is to suggest that in the kingdom of proscribable speech, knowing falsehoods may occupy the lowest order and, therefore, be most susceptible to regulation without offending the Free Speech Clause.

C. The Question Presented Is An Important One To The States

The First Amendment issue presented is one of significant constitutional import which is important to the states. First Amendment-based challenges to section 148.6, and a similar statute in the State of Nevada, have prompted conflicting judicial opinions. Thus, while the California Supreme Court and the district court judge below rejected challenges to the statute

in reasoned opinions, other district courts have found section 148.6, and a similar Nevada statute, unconstitutional. *Hamilton v. City of San Bernardino*, 107 F. Supp. 2d 1239 (C.D. Cal. 2000) (finding section 148.6 unconstitutional, applying *R.A.V.*); *Eakins v. Nevada*, 219 F. Supp. 2d 1113 (D.Nev. 2002) (finding Nev. Rev. Stat. § 199.325 (2004) unconstitutional, applying *R.A.V.*).

Additionally, at least six other states — Nevada (Nev. Rev. Stat. § 207.280 (Westlaw through June 2005 amendments)); Wisconsin (Wis. Stat. Ann. § 946.66 (Westlaw through 2005)); New Hampshire (N.H. Rev. Stat. Ann. § 641:4, I (1996), as interpreted in *State v. Allard*, 148 N.H. 702, 707, 813 A.2d 506, 511 (2002)); Minnesota (Minn. Stat. Ann. § 609.505 (Westlaw 2005 First Spec. Sess.); Indiana (Ind. Code § 35-44-2-2(d)(5) (Westlaw through 2005 First Reg. Sess.)); and Ohio (Ohio Rev. Code Ann. § 2921.15 (Westlaw through 2005 Sess.)) — have statutes similar to section 148.6 whose constitutionality is placed in doubt by the Ninth Circuit's decision. Further, the Ninth Circuit's analysis would place in doubt various state statutory provisions designed to protect other types of public servants and licensed and regulated professionals, such as teachers, health care professionals, and lawyers, from false allegations of misconduct. *See* Cal. Educ. Code § 44242.5 (West Supp. 2006) (complaint against teacher requires an affidavit which, if false, is subject to prosecution under the felony perjury statute); Cal. Bus.& Prof. Code §§ 1670 (West 2003), 1680 (West Supp. 2006) (same, dentists), 2230 (West Supp. 2006), 2234 (West 2003) (same, physicians), 2759 (West 2003), 2761 (West 2003) (same, nurses), 3090 (West Supp. 2006) (same, optometrists), 7011.8 (West Supp. 2006) (infraction to make false complaint against a licensed contractor), 6043.5 (West 2003) (misdemeanor to make a knowingly false claim to the State Bar of professional misconduct by a lawyer).

D. The Ninth Circuit's Decision Is Based On The Erroneous Premises That A Statement In The Course Of A Misconduct Investigation Has The Same Consequence And Requires The Same Sanction As A False Complaint Which Initiates That Investigation And That A Knowingly False Allegation Of Misconduct Expresses A "Viewpoint"

1. The Ninth Circuit acknowledged that the state has a legitimate interest in prohibiting false complaints of police misconduct because such complaints mandate that valuable state resources be expended investigating false claims rather than legitimate complaints and because such false complaints lead to unwarranted sanctions against the officer. However, the circuit court concluded that a false assertion made by a police officer or witness *supportive* of the accused officer during the course of a misconduct investigation has equally pernicious effects. App. at 22a-23a. This is simply not the case. The false allegation which prompts an investigation — the "false alarm" — is widely regarded as more pernicious, and therefore more deserving of regulation, than a false statement in the course of an ensuing investigation. A host of states, including California, have statutes which criminalize the false report of a crime. Cal. Penal Code § 148.5 (West 1999). However, many states do not have a statute, like 18 U.S.C. § 1001, which makes it a crime to make a false statement to a law enforcement officer in the course of an investigation of a crime or other matter within the jurisdiction of a law enforcement agency, such as a peace officer misconduct investigation.

As the Maryland Court of Appeal explained in *Johnson v. State*, 75 Md.App. 621, 631-39, 542 A.2d 429, 433-37 (1988), statutes enacted to proscribe the filing of a false report which causes the police to initiate a fruitless investigation and thereby divert them from their proper duties of preventing and investigating actual incidents of crime, trace back to the British case of *The King v. Manley*, 1 K.B. 529 (C.C.A. 1932). There

the appellate court upheld the conviction of Manley for falsely reporting a robbery and identifying her robber on the basis of the common law notion of "committing an act tending to the public mischief" because her act diverted police resources to an idle charge and placed the accused "in peril of suspicion." *The King v. Manley*, 1 K.B. at 534-35. The *Johnson* court noted that the *Manley* decision served as the basis for the development of such a "false reporting" offense in the Model Penal Code and that the Maryland House, like other state Legislatures, had adopted such a statue which punished the filing of a false report of a crime — the "false alarm" — but not false statements given to the police in the course of the ensuing investigation because of the greater harm done by the "false alarm." *Johnson* at 639.

The fact is that the societal harms from a "false alarm," and the government's interest in suppressing such "false alarms," are more substantial than false statements once an investigation is underway. While a false statement at any point in the process creates an obstacle to the ultimate goal of determining truth and rectifying a wrong, the greatest damage is done when it is a false report that triggers a (wasteful) inquiry in the first place. *See State v. Allard*, 148 N.H. at 706-08 (balancing First Amendment interest in the right to criticize the police, New Hampshire Supreme Court construed its "false information to law enforcement" statute (N.H. Rev. Stat. Ann. § 641:4, I) to apply to a claim of misconduct only when the person intends to prompt a police investigation of the claim). Our laws recognize the particularly pernicious effects of the "false alarm" even if the Ninth Circuit does not.

2. The Ninth Circuit suggests a cure for what it perceives to be the constitutional defect in section 148.6 — the State could simply outlaw all false statements to law enforcement officials in the course of an official investigation. However, the question is not whether a state could enact such a measure, but whether the Constitution compels this result. To be sure, such a sweeping enactment raises significant policy concerns. Such a broad regulation could work great mischief in the hands of an

unscrupulous or biased police officer or prosecutor. Indeed, that may explain why many jurisdictions have enacted a statute which makes it a crime to file a false report of a crime, but have not enacted a statute, similar to 18 U.S.C. § 1001, which makes it a crime to give a false statement in the course of the investigation of a crime. *See* Model Penal Code & Commentaries, art. 421, § 241.5, at 159-61 (Am. Law. Inst., 1980).

It is somewhat ironic that in an effort to fix what it perceives to be the Free Speech Clause defect in section 148.6, the Ninth Circuit proposes a sweeping statute that would regulate and potentially chill a broad range of statements in a myriad of circumstances. *See* decisions curtailing or criticizing such a broad application of 18 U.S.C. § 1001, *U.S. v. Chevoor*, 526 F.2d 178, 182-83 & nn.10, 11 (1st Cir. 1975); *Friedman v. U.S.*, 374 F.2d 363, 366 (8th Cir. 1967); *U.S. v. Thevis*, 469 F. Supp. 490, 514 (D.Conn. 1979); *and see Brogan v. U.S.*, 522 U.S. 398, 408-18 (1998) (Ginsburg, J., concurring) (questioning the broad sweep of 18 U.S.C. § 1001 and noting its potential for abuse).

3. Absent from the Ninth Circuit's analysis is any acknowledgment that section 148.6 is but a part of the system erected by California Penal Code section 832.5, which encourages citizen complaints of peace officer misconduct by requiring that all agencies employing peace officers have a regular procedure to receive such complaints and that they then must investigate, report and keep records concerning such investigations. This is a "special forum" which the state has put in place and section 148.6 is but a reasonable regulation "in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 804 (1985). Nothing in section 148.6 "abridge[s] the freedom of speech," meaning, in this context, the right to criticize the police, whether by picketing in front of the station house, writing to the local newspaper or complaining to the city council or police review board. *See City of Houston, Tex. v. Hill*, 482 U.S. 451,

461 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

The statute regulates only knowingly false complaints in this "special forum" which requires a thoroughgoing government response. As this Court has acknowledged,

> In determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand content discrimination, which may be permissible if it preserves the purposes of that limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. at 829-30.

To be sure, section 148.6 serves the purpose of the peace officer misconduct reporting "forum" by banning only knowingly false complaints, and does not discriminate on the basis of viewpoint "directed against speech otherwise within the forum's limitations." The notion that the state has created a process which invites citizens to complain of peace officer misconduct and then requires that those complaints be investigated, must also entertain knowingly false complaints is simply absurd. The statute serves as a reasonable regulation in light of the purpose served by the forum.

4. Finally, in an apparent effort to finesse any discussion of permissible content regulation the Ninth Circuit straightaway concluded the statute discriminates on the basis of "viewpoint." The circuit court simply determined that because section 148.6 proscribes speech "*critical*" of a peace officer — the initial false report — but not speech "*supportive*" of a peace officer —

presumably, a false statement by a witness in the course of the misconduct investigation which refutes the claim of misconduct — the statute discriminates on the basis of "viewpoint." This facile conclusion does not withstand scrutiny. A knowingly false statement, whether accusing an officer of misconduct or tending to refute the accusation and exonerate the officer, is neither "critical" nor "supportive"; each is simply false and intended, in the first instance, to maliciously harm the system or the officer, and, in the second instance, to hamper the search for the truth. Such false statements do not express a "viewpoint" as that term is understood for purposes of the Free Speech Clause.

A "viewpoint" within the ambit of the First Amendment is speech "motivat[ed] by an ideology or the opinion or perspective of the speaker" and "viewpoint" regulation occurs when the speaker's ideology, opinion or perspective is the rationale for the regulation. *Rosenberger*, 515 U.S. at 829. Regulation of knowingly false allegations of police misconduct intended to require an investigation is not motivated by an effort to address any ideology, opinion or perspective. The only motivation for the regulation is to prevent the abuse of the complaint process and its effects. Section 148.6 does not regulate on the basis of the speaker's motivation, ideology, opinion or perspective and is not a guise for disagreement with the viewpoint expressed. It does not discriminate on the basis of "viewpoint" — speech *critical* of the police — because it is a part of a larger statutory mechanism which encourages complaints *critical* of the police, so long as those complaints are not knowingly false.

Unlike the regulation at issue in *R.A.V.*, section 148.6 regulates only knowing false allegations, not expressions of viewpoint, and does "not license one side of a debate while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* at 392. The peace officer misconduct complaint process the State of California has erected is not a debating society, a community bulletin board, a public park or sidewalk or a media outlet. It embodies an entire governmental process which seeks

to curb police abuses by encouraging citizen complaints and it does not offend the Free Speech Clause to retard knowingly false complaints from infecting and corrupting the system.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 1, 2006

Respectfully submitted,

BONNIE M. DUMANIS
San Diego County District Attorney

JESUS RODRIGUEZ
Assistant District Attorney

KIM-THOA HOANG
Deputy District Attorney

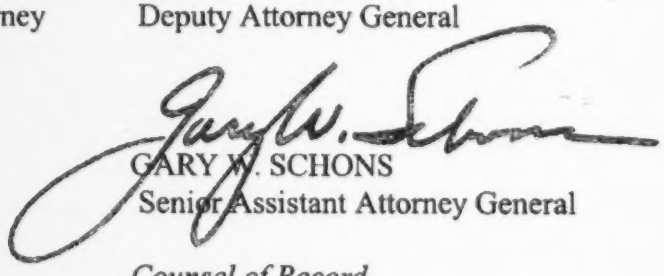
KELLY M. RAND
Deputy District Attorney

BILL LOCKYER
Attorney General of the State of California

MANUEL MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

STEVEN T. OETTING
Deputy Attorney General



GARY W. SCHONS
Senior Assistant Attorney General

Counsel of Record

Counsel for Petitioner
Alan Crogan, Chief Probation Officer

Counsel for Petitioner
The People of the State of California

GWS:nes
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APPENDIX A

APPENDIX A

[Filed December 7, 2005]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARREN DAVID CHAKER	)	No. 03-56885
	)	
Petitioner-Appellant	)	
	)	**ORDER**
v.	)	
	)	
ALAN CROGAN, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	

Before: HUG, PREGERSON, and BERZON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Pregerson and Berzon have voted to deny the petition for rehearing en banc, and Judge Hug has so recommended said denial.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing and for rehearing en banc are DENIED.

APPENDIX B

APPENDIX B

[Filed November 3, 2005]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARREN DAVID CHAKER, *Petitioner-Appellant*, v. ALAN CROGAN; SAN DIEGO PROBATION DEPARTMENT; PEOPLE OF THE SATE OF CALIFORNIA, *Respondents-Appellees*.	No. 03-56885 D.C. No. CV-00-02137-BTM OPINION

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted
December 6, 2004—Pasadena, California

Filed November 3, 2005

Before: Procter Hug, Jr., Harry Pregerson, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Pregerson

COUNSEL

Walter K. Pyle, Berkeley, California, for the petitioner-appellant.

Kelly M. Rand, Deputy District Attorney, San Diego, California, for the respondents-appellees.

Mark D. Rosenbaum (argued), Alan L. Schlosser, Los Angeles, California, and Daniel P. Tokaji (briefed), Columbus, Ohio, for ACLU of San Diego and Imperial Counties, ACLU of Southern California and ACLU of Northern California.

Everett L. Bobbitt (briefed), Bobbitt & Pinckard, San Diego, California, for El Cajon Police Officers Assn., San Diego County Deputy Sheriff's Assoc. and San Diego Police Officers Assn.

Michael D. Schwartz (briefed), Ventura, California, for California District Attorney's Assoc.

Christopher D. Lockwood (argued), Joseph Arias (briefed), Arias, Lockwood & Gray, San Bernardino, California, for City of San Bernardino.

Alison Berry Wilkinson (briefed), Rains, Lucia & Wilkinson, Pleasant Valley, California, for Peace Officers Research Assoc. of California Legal Defense Fund.

Kent S. Scheidegger (briefed), Sacramento, California, for Criminal Justice Legal Foundation.

Michael R. Capizzi (argued), Krista McNevin Jee (briefed), Fullerton, California, for California State Sheriff's Assn., California Police Chief's Assn. and California Peace Officers Assn.

OPINION

PREGERSON, Circuit Judge:

Darren David Chaker appeals the district court's denial of his habeas corpus petition brought under 28 U.S.C. § 2254. Chaker was convicted by a jury for filing a knowingly false complaint of peace officer misconduct in violation of California Penal Code section 148.6(a)(1). In his habeas corpus petition, Chaker alleges that California Penal Code section 148.6 violates the First Amendment. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

As discussed below, a formal complaint of peace officer misconduct triggers a mandatory investigation conducted by the peace officer's employing agency. Within the limited context of that investigation, section 148.6 criminalizes knowingly false

speech critical of peace officer conduct, but leaves unregulated knowingly false speech supportive of peace officer conduct. Because we conclude that the statute impermissibly discriminates on the basis of a speaker's viewpoint in violation of the First Amendment, we reverse the district court and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On April 9, 1996, El Cajon Police Officers Bill Bradberry and Terry Johnston arrested Chaker for theft of service for retrieving his car from a mechanic without paying. Several months later, on August 15, 1996, Chaker filed a claim for damages form with the City of El Cajon alleging that Officer Bradberry injured him during the arrest. Specifically, Chaker alleged that Officer Bradberry hit him in the ribs, twisted his wrist, and failed to secure Chaker in the police vehicle with a seat belt so that Chaker struck his head during sudden stops.[1] Chaker also sent a letter directly to the El Cajon Police Department Internal Affairs Division, dated March 23, 1997, making the same complaint. In addition to the preceding allegations, Chaker alleged that he was strip-searched by Detective Bradberry. Chaker signed the March letter under penalty of perjury.

In March 1998, the San Diego District Attorney's office filed a misdemeanor criminal complaint against Chaker in state court. The complaint charged Chaker with the misdemeanor

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[1] Chaker described Officer Bradberry's conduct as follows: (1) "Unlawful use of force. Det. Bill Bradberry [used] force by hitting me, twisting [my] wrist, when he arrested me," (2) "[o]n or about April 8, 1996 at 1 pm. I complied [with the] arrest but Det. Bradberry hit me on my ribs anyway," (3) "Det. Bradberry's use of force damaged my wrist, ribs," (4) "Det. Bradbery did not seat belt me in when transported — he braked so I hit the dashboard. Ribs hurt, [wrist]" Chaker requested $25,000 in damages from the City of El Cajon.

offense of filing a knowingly false allegation of peace officer misconduct in violation of California Penal Code section 148.6(a)(1). At the ensuing jury trial, Officers Bradberry and Johnston testified and denied using excessive force against Chaker. A witness to the arrest testified that the arrest appeared to be routine. She stated that from her vantage point, Chaker did not seem to be in any pain during the arrest. Finally, the Internal Affairs Officer responsible for investigating Chaker's complaint testified and authenticated the letter submitted by Chaker to the El Cajon Police Department.

At trial, the court admitted a civil complaint in a lawsuit filed by Chaker against Officer Bradberry. The complaint contained a claim for slander arising out of an encounter between Officer Bradberry and Chaker on April 11, 1996, two days after Officer Bradberry arrested Chaker for theft of services.[2] The court reasoned that the state could use the complaint as evidence of what was "not on it," for example, any discussion of Officer Bradberry's alleged use of excessive force during Chaker's April 9, 1996, arrest.[3]

On February 22, 1999, the jury found Chaker guilty of violating section 148.6(a)(1). The court sentenced Chaker to two days of custody with credit for time served, fifteen days of public service, and three years of probation. The court also ordered Chaker to pay a fine and restitution totaling $1142.

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[2] Prior to trial, the court excluded evidence of between ten or twelve suits filed by Chaker against other law enforcement agencies. The court also excluded evidence that Chaker had been declared a vexatious litigant in another lawsuit.

[3] The court also admitted a statement made by Chaker to an attorney in an unrelated lawsuit against a different El Cajon Police Officer. According to the attorney, Chaker said, "If all that happens in this case is that the City of El Cajon has to pay your fee of $20,000, and that prevents the City from purchasing one or two patrol cars, then that is an acceptable result to me."

Chaker appealed his conviction to the San Diego County Appellate Division of the Superior Court. That court affirmed his conviction. Rather than continue his direct appeal, Chaker filed a habeas corpus petition in Superior Court, and then another in the California Supreme Court, alleging ineffective assistance of both trial and appellate counsel. Both courts denied his petitions. Chaker filed a second habeas petition in the California Supreme Court on December 26, 2000, this time alleging denial of the right to self-representation. This petition was denied as well.

On October 23, 2000, Chaker filed a pro se habeas petition in federal district court alleging various problems with his state conviction. While his federal habeas petition was pending before the district court, Chaker filed his third state habeas petition with the California Supreme Court on September 10, 2001.

In his third state habeas petition, Chaker raised for the first time a First Amendment challenge to section 148.6. This petition was also denied, and the order denying the petition cited California cases concerning procedural default. After the California Supreme Court rejected Chaker's First Amendment challenge, he raised the claim in his February 25, 2002, amended federal habeas petition.

On November 8, 2002, Chaker moved for summary judgment on his First Amendment claim. The magistrate judge issued a Report and Recommendation recommending denial of Chaker's habeas petition. The district court adopted in part the conclusions of the magistrate judge, denied the petition, and issued a limited certificate of appealability on Chaker's First Amendment claim.

ANALYSIS

I. *Procedural Issues and Standard of Review*

The state and amicus curiae supporting the state raise several issues potentially barring our review of Chaker's habeas petition. The state argues that we lack jurisdiction because Chaker was no longer serving his probation at the time of this appeal. The state also contends that the present appeal is moot because Chaker is not suffering any significant collateral consequences from his conviction. Finally, amicus curiae Criminal Justice Legal Foundation ("CJLF") argues that because Chaker failed to raise his First Amendment claim while he was still in custody, the district court lacked jurisdiction over Chaker's First Amendment claim. We resolve these issues before addressing the merits of Chaker's First Amendment claim.

A. *Jurisdiction*

[1] The state argues that we should dismiss Chaker's petition for lack of jurisdiction because Chaker is no longer on probation, and thus is not "in custody" for habeas purposes. The state is correct that "[f]or a federal court to have jurisdiction over a habeas petition filed by a state prisoner, the petitioner must be 'in custody.' " *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001). Nonetheless, if a petitioner is in custody at the time he files his federal habeas petition, his subsequent release from custody does not deprive the court of its jurisdiction. *See Carafas v. LeVallee*, 391 U.S. 234, 238 (1968); *United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467, 1470 (9th Cir. 1988). Furthermore, a petitioner is "in custody" for the purposes of habeas jurisdiction while he remains on probation. *Id.*; *see also Jackson v. Coalter*, 337 F.3d 74, 79 (1st Cir. 2003). Thus, because Chaker was still serving his probation on the date he filed his habeas petition in federal court, we have jurisdiction over this appeal.

B. *Mootness*

[2] The state next argues that this case is moot, contending that Chaker is no longer suffering any significant collateral consequences as a result of his misdemeanor criminal conviction. This argument is foreclosed by *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), *overruled on other grounds*, 8 U.S.C. § 2254(c). In *Chacon*, we recognized an irrebutable presumption that collateral consequences result from any criminal conviction. *See id.* We explained that "[o]nce convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state laws that either already have been or may eventually be passed." *Id.*; *accord Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997); *Larche v. Simons*, 53 F.3d 1068, 1070-71 (9th Cir. 1995). Because Chaker faces the prospect of harsher punishment at a later date as a result of his conviction under section 148.6, his claim continues to present a live controversy.[4]

C. *Statute of Limitations*

Federal habeas petitions ordinarily must be filed within one year of the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A); *see Mayle v. Felix*, 125 S. Ct. 2562, 2573 (2005) (quoting statute).

Chaker's conviction was affirmed on direct review by the San Diego County Appellate Division of the Superior Court on October 15, 1999. He did not directly appeal that decision. Thus, Chaker's conviction became final after the thirty day time

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[4] The state also argues that Chaker lacks standing to attack his conviction on First Amendment grounds. We disagree. Chaker has shown "that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2308 (2004) (citations omitted).

period for filing a notice of appeal lapsed. *See* Cal. R. Ct. 182(a). He filed his federal habeas petition on October 23, 2000, within one year of the date his state conviction became final.

It was not until Chaker filed his second amended petition, filed nunc pro tunc on February 25, 2002, that he raised his First Amendment challenge to section 148.6. Chaker's second amended petition, filed more than two years after his conviction became final, was therefore filed long after the applicable statute of limitations ran. Amicus curiae CJLF contends that Chaker's First Amendment claim, found in his second amended petition, does not "relate back" to his initial petition within the meaning of Federal Rule of Civil Procedure 15(c)(2),[5] and is therefore time barred by the applicable one year statute of limitations. *See Mayle*, 125 S. Ct. at 2573-75 (concluding that claims in petitioner's amended habeas corpus petition did not "relate back" to initial petition within the meaning of Rule 15(c)(2), and were therefore barred by applicable one year statute of limitations).

Even so, the state failed to raise a statute of limitations defense to Chaker's First Amendment claim in federal district court, thereby waiving it. *See Nardi v. Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) (holding that the statute of limitations set forth in 28 U.S.C. § 2244(d)(1)(A) is an affirmative defense "that the state waives . . . by filing a responsive pleading that fails to affirmatively set forth the defense"). Moreover, the state does not discuss the statute of limitations anywhere in its brief before this court. Accordingly, we decline to consider an argument raised only by CJLF on appeal. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136,

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[5] Federal Rule of Civil Procedure 15(c)(2) provides, in part, that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

1141 n.1 (9th Cir. 1998) (declining to address argument because "as [amicus curiae] candidly acknowledges, it is raised for the first time on appeal, and not by any party"); *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) ("Generally, we do not consider on appeal an issue raised only by an amicus.").

D. *Procedural Default and Standard of Review*

Generally, under the provisions of the Antiterrorism and Effective Death Penalty Act, a federal habeas court reviews a state court's decision to determine whether the state decision was " 'contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.' " *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting 28 U.S.C. § 2254(d)(1)).

In this case, however, Chaker's First Amendment claim was never decided on the merits in a state court. Rather, the California Supreme Court denied Chaker's First Amendment claim without opinion, citing cases relating to procedural default.

Procedural default normally constitutes an adequate and independent state ground precluding federal court review of a habeas petition. *See Zichko*, 247 F.3d at 1021. But the state did not raise the issue of procedural default in district court or on appeal. Consequently, the state waived its procedural default defense by failing to raise the issue in response to Chaker's habeas petition. *See Franklin v. Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002). Moreover, though we may sua sponte dismiss Chaker's petition as procedurally barred, *see Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003), we decline to do so as "the state provides no explanation whatsoever for its failure to raise a procedural default argument in the district court, much less any extraordinary reason for reaching the procedural default defense despite the state's failure to raise the issue below," *Franklin*, 290 F.3d at 1233.

Thus, although we are not precluded from ruling on the merits of Chaker's claim due to his procedural default, there is no state court ruling on the merits of Chaker's First Amendment claim. There is therefore no state decision to review to determine whether the decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In such a circumstance, we review the district court's decision de novo without the deference usually accorded state courts under 28 U.S.C. § 2254(d)(1). *See Hudson v. Hunt*, 235 F.3d 892, 895 (4th Cir. 2000) (applying de novo standard of review to a claim in a habeas petition that was not adjudicated on the merits by the state court); *Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir. 2000) (same); *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999) (same). "To the extent it is necessary to review findings of fact made in the district court, the clearly erroneous standard applies." *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002).

II. *California Penal Code section 148.6 and the First Amendment*

A. *California Penal Code section 148.6*

[3] California Penal Code section 148.6 makes it a misdemeanor to "file[ ] any allegation of misconduct against any peace officer . . . knowing the allegation to be false." Cal. Penal Code § 148.6(a)(1). Any law enforcement agency that accepts an allegation of misconduct against a peace officer must require the complainant to read and sign an advisory statement warning the complainant in boldface type, in part, "IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT

IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE."[6] Cal. Penal Code § 148.6(a)(2).

The California Legislature enacted section 148.6 in 1995, Stats. 1995, ch. 590 Section 1; Assem. Bill No. 1732 (1995-

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[6] The full advisory, which must be written in boldface type, provides:

> YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.
>
> IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

Cal. Penal Code § 148.6(a)(2).

Chaker never signed this advisory before making his complaint. Rather, he sent in an informal letter to the El Cajon Police Department, signed under penalty of perjury, complaining of Officer Bradberry's conduct. It was Chaker's letter that formed the basis of his prosecution under section 148.6.

Chaker argued that signing the advisory was an element of the offense, and he challenged his conviction on that basis in both his state and federal habeas petitions. But the state courts and the district court ruled against Chaker on this claim. Accordingly, we presume for the purposes of this appeal that signing the advisory was not an essential element of the offense.

1996 Reg. Sess.), partly in response to a perceived gap created by several state court decisions construing Penal Code section 148.5. *See People v. Stanistreet*, 29 Cal. 4th 497, 502 (2002). Section 148.5 makes it a misdemeanor to report a suspected felony or misdemeanor knowing the report of criminal activity to be false. *See id.* California courts, however, construed section 148.5 as not reaching complaints of police misconduct. *See id.* (citing *Pena v. Mun. Court*, 96 Cal. App. 3d 77, 83 (1979), and *People v. Craig*, 21 Cal. App. 4th Supp. 1, 3, 6 (1993)).

In *Pena*, the California Court of Appeal noted that

> Allowing police officials to prosecute a citizen for filing a complaint against an officer . . . by using the provisions of Penal Code section 148.5 would have the tendency to "chill" the willingness of citizens to file complaints, particularly on weak evidence and when the same entity against which the complaint is made will be investigating the accusations.

96 Cal. App. 3d at 83. The court therefore concluded that "the Legislature did not intend citizens' complaints to a law enforcement entity concerning the conduct of that entity or its officers . . . to be within the definition of a police report for the purposes of Penal Code section 148.5." *Id.* Thus, "section 148.6 fills the gap" by covering "all citizens' complaints of police misconduct during the performance of an officers' duties that may or may not rise to the level of a criminal offense." *Stanistreet*, 29 Cal. 4th at 503 (internal quotation marks and citation omitted).

According to the California Supreme Court, the sanction imposed by section 148.6 is unique in California's statutory scheme. As the California Supreme Court recognized, "section 148.6 gives protection to peace officers that the Legislature has not given to others," observing that "[i]t is not a crime to knowingly make such an accusation against a firefighter, a

paramedic, a teacher, an elected official, or anyone else." *Id.* (internal quotation marks and citation omitted).

Similarly, California law imposes a unique complaint process and record-keeping requirement for complaints of peace officer misconduct. Specifically, California Penal Code section 832.5 provides that "[e]ach department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public . . . and shall make a written description of the procedure available to the public." Cal. Penal Code § 832.5(a)(1). Section 832.5 also requires that such complaints be retained for five years, unless the complaints are "determined to be frivolous, unfounded, or exonerated" by the peace officer's employing agency, in which case the complaint "shall not be maintained in that officer's general personnel file."[7] Cal. Penal Code § 832.5(b), (c).

[4] In enacting section 148.6, the California legislature was motivated in part by the perceived abuse of citizen complaint procedures by "less ethical citizens." As one court summarized,

> [t]he Legislature noted that since the Rodney King incident in March 1991, law enforcement agencies throughout the state had 'revised their citizen complaint procedures to promote greater accountability on the part of their line officers.' (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1732 (1995-1996 Reg. Sess.).) However, a "glaringly negative side-effect which has resulted

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[7] Use and discovery of complaints of peace officer misconduct is limited. Employing agencies "shall not use the complaints . . . for punitive or promotional purposes" except as permitted under specific disciplinary procedures set forth by statute. Cal. Penal Code § 832.5(c). Furthermore, a party seeking discovery of such complaints in any civil or criminal proceeding must provide notice to the employing agency and show "good cause" for the discovery; otherwise such records are confidential. *See* Cal. Penal Code § 832.7; Cal. Evid. Code § 1043.

> [was] the willingness on the part of many of our less ethical citizens to maliciously file false allegations of misconduct against officers in an effort to punish them for simply doing their jobs." (Ibid.) Against this backdrop, the Legislature enacted section 148.6, in an attempt to curb a perceived rising tide of knowingly false citizens' complaints of misconduct by officers performing their duties.

San Diego Police Officers Ass'n. v. San Diego Police Dep't., 76 Cal. App. 4th 19, 23 (1999). Numerous law enforcement agencies throughout the state supported the enactment of section 148.6.[8]

B. *Viewpoint Discrimination and the First Amendment*

Chaker argues that section 148.6 impermissibly discriminates on the basis of viewpoint in violation of the First Amendment. While he concedes that knowingly false speech regarding a public official is generally unprotected by the First Amendment, *see Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), he argues that the statute impermissibly singles out speech critical of peace officers for special criminal sanction.[9] Because section 148.6 applies only to the filing of a formal complaint of peace

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[8] We grant Chaker's motion for judicial notice, in which he requests we take judicial notice of the legislative history of § 148.6. *See* Fed. R. Evid. 201(b).

[9] Several courts have already addressed this precise issue. The California Supreme Court rejected a First Amendment challenge to section 148.6 similar to the instant challenge. *See Stanistreet*, 29 Cal. 4th at 512. One federal district court, however, held that the statute is an impermissible content-based and viewpoint-based regulation of speech in violation of the First Amendment. *See Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087 (C.D. Cal. 2004); *see also Eakins v. Nevada*, 219 F. Supp. 2d 1113 (D. Nev. 2002) (striking down analogous provision of Nevada law on First Amendment grounds).

officer misconduct with an agency employing peace officers, our First Amendment analysis focuses solely on the application of section 148.6 within the context of the complaint investigation process.

[5] The protections afforded by the First Amendment, made applicable to the States by the Fourteenth Amendment, are not absolute and the government may regulate certain categories of expression consistent with the Constitution. *See Virginia v. Black*, 538 U.S. 343, 358 (2003). For example, "fighting words," defamation, and obscenity, are "not within the area of constitutionally protected speech," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (citations omitted), because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[6] Nevertheless, these categories of speech are not rendered "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *R.A.V.*, 505 U.S. at 383-84; *see also Black*, 538 U.S. at 361. "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *R.A.V.*, 505 U.S. at 384; *see id.* (rejecting the notion that "a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government").

The leading case establishing the First Amendment's application to proscribable classes of speech is *R.A.V.*. In *R.A.V.*, the Supreme Court considered the constitutionality of a Minnesota statute banning certain symbolic expression,

including cross burning, when done with the knowledge that such conduct would " 'arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.' " 505 U.S. at 380 (quoting Minnesota statute). The Court first recognized that, as construed by the Minnesota Supreme Court, the statute only reached "fighting words," thereby limiting the statute's reach to a category of speech generally unprotected by the First Amendment. *See id.* at 380-81.

Even with the limiting construction, however, the Court concluded that the statute was an impermissible content-based regulation of speech. The Court noted that "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics," such as race, color, creed, religion, or gender. *Id.* at 391. The Court further explained that those "who wish to use 'fighting words' in connection with other ideas — to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality — are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.*

The Court further held that the statute impermissibly discriminated on the basis of viewpoint. *See id.* ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."). The Court reasoned that

> Displays containing some words — odious racial epithets, for example — would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender — aspersions upon a person's mother, for example — would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by

> those speakers' opponents. One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

Id. at 391-92.

Finally, the Court held that the statute was not narrowly tailored to meet the state's compelling interest in ensuring "the basic human rights of members of groups that have historically been subjected to discrimination." *Id.* at 395. The Court concluded that "[a]n ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect" as the impermissible content-based statute. *See id.* at 396.

The Court revisited *R.A.V.* in *Virginia v. Black*. In *Black*, two defendants challenged the constitutionality of a Virginia statute making it a crime to burn a cross with the intent to intimidate, contending that the statute fit within the Court's holding in *R.A.V. See Black*, 538 U.S. at 360-63. In rejecting the defendants' First Amendment challenge, the Court noted first that "some types of content discrimination [do] not violate the First Amendment." *Id.* at 361. For example, where "the basis for the content discrimination consists of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 361-62 (quoting *R.A.V.*, 505 U.S. at 388).

The Court distinguished its decision in *R.A.V.*, and explained that the Virginia statute was directed at *all* cross burning done with the intent to intimidate. *See id.* at 362. Because the Virginia statute did not distinguish between intimidation based on a victim's race, gender, or religion, unlike the ordinance at issue in *R.A.V.*, there was no significant threat

that the state "single[d] out for opprobrium only that speech directed toward 'one of the specified disfavored topics.' " *Id.* (quoting *R.A.V.*, 505 U.S. at 391).

The Court also concluded that the Virginia statute did not violate the First Amendment "because burning a cross is a particularly virulent form of intimidation." *Id.* at 363. It therefore concluded that "just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm." *Id.*

[7] Just as in *R.A.V.*, the category of speech at issue in this case — knowingly false speech regarding a public official — is "not within the area of constitutionally protected speech." *R.A.V.*, 505 U.S. at 383. As the Supreme Court made clear in its landmark decision in *New York Times*, a public official may recover damages for a defamatory falsehood if he or she can prove "that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. That same standard has been applied in the context of state criminal libel laws where a public official is concerned. *See Garrison*, 379 U.S. at 74 ("The constitutional guarantees of freedom of expression compel application of the [*New York Times*] standard to the criminal remedy."). Indeed, it is well-established that knowing falsehoods are constitutionally unprotected because they are "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Id.* at 75.

[8] Thus, it is clear that the state may prohibit knowingly false speech made in connection with the peace officer complaint process. As the state correctly points out, knowingly false complaints of peace officer misconduct cause valuable

state resources to be expended investigating false claims rather than investigating valid claims. *See Stanistreet*, 29 Cal. 4th at 509 ("This requirement of an investigation [imposed by section 832.5], and the resulting investigation itself, can have substantial effects. Public resources are required to investigate these complaints, resources that could otherwise be used for other matters . . . ."). Furthermore, false complaints knowingly made against a peace officer may lead to unwarranted sanctions against the officer. Section 148.6 therefore furthers the state's interest in preventing potential discipline against innocent peace officers.

[9] Nevertheless, following both *R.A.V.* and *Black*, we must determine whether California Penal Code section 148.6 violates the First Amendment's core requirement of viewpoint neutrality even though the statute regulates otherwise unprotected speech. *See Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 282 n.12 (2d Cir. 1997) ("*R.A.V.* provides that the First Amendment's prohibition against viewpoint discrimination applies to *both* protected and unprotected speech."). This requires us to consider whether the statute "regulate[s] speech in ways that favor[s] some viewpoints or ideas at the expense of others." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Stated differently, our task is to determine whether "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). We also find instructive nonpublic forum cases in which the Supreme Court has repeatedly reminded us that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

[10] We begin our analysis by recognizing that a knowingly false assertion made by a peace officer or witness in support of a peace officer during the course of a misconduct investigation, like a knowingly false complaint of misconduct, is equally "at odds with the premises of democratic government." *Garrison*, 379 U.S. at 75. In most cases, "it inevitably will come down to the word of the citizen against the word of the police officer or officers, in which case law enforcement authorities will conduct an investigation to determine who is telling the truth." *Stanistreet*, 29 Cal. 4th at 513-14 (Werdegar, J., concurring). Consequently, a peace officer or witness who lies during an investigation is equally to blame for wasting public resources by interfering with the expeditious resolution of an investigation. As one California court noted, the state developed its citizen complaint procedures "to promote greater accountability on the part of [its] line officers." *San Diego Police Officers Ass'n.*, 76 Cal. App. 4th at 23 (quoting Assem. Comm. on Public Safety, Analysis of Assem. Bill No. 1732 (1995-1996 Reg. Sess.). Section 148.6, however, undermines that goal by holding only citizen *complainants* accountable for their knowing falsehoods, while leaving unregulated the knowingly false speech of a peace officer or witness.

[11] The state's asserted interest in saving valuable public resources and maintaining the integrity of the complaint process is therefore called into question by its choice to prohibit only the knowingly false speech of those citizens who complain of peace officer conduct. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place."). The Supreme Court has looked skeptically on statutes that exempt certain speech from regulation, where the exempted speech implicates the very same concerns as the regulated speech. *See Republican Party of Minn. v. White*, 536 U.S. 765,

780 (2002) (noting that statute at issue was "so woefully underinclusive" that the state's asserted interest in the statute was "a challenge to the credulous"); *Florida Star v. B.J.F.*, 491 U.S. 524, 540, (1989) ("[T]he facial underinclusiveness" of a regulation of speech "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance."). While there is no general First Amendment prohibition on the under-inclusive regulation of speech, *see R.A.V.*, 377 U.S. at 387, "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people,' " *City of Ladue*, 512 U.S. at 51 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978)); *see also Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995).

The statute's under-inclusiveness is particularly troublesome in this case because section 148.6 is necessarily limited to criticism of government officials — peace officers. "Suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government," *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004), because "[c]riticism of government is at the very center of the constitutionally protected area of free discussion," *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). *See also City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."); *New York Times*, 376 U.S. at 270 (recognizing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). The imbalance generated by section 148.6 — i.e., only individuals *critical* of peace officers are subject to liability and not those who are supportive — therefore turns the First Amendment on its head.

An illustration drawn from this case may be helpful. At Chaker's criminal trial, the witness who observed Chaker's arrest testified that she saw no signs of excessive force during Chaker's arrest. However, had the witness made this statement to the investigator charged with investigating Chaker's complaint, knowing the statement to be false, the witness would not have faced criminal sanction under section 148.6. Similarly, had Officer Bradberry made a knowingly false statement to the investigator charged with investigating Chaker's complaint, Officer Bradberry would not have faced criminal sanction under section 148.6. It is only Chaker, who filed a complaint of peace officer misconduct complaining that Officer Bradberry mistreated him in the course of an arrest, who faced criminal liability under section 148.6 for his knowing falsehood.

[12] For these reasons, we find the Supreme Court's analysis in *R.A.V.* controlling. Like the ordinance at issue in *R.A.V.*, section 148.6 regulates an unprotected category of speech, but singles out certain speech within that category for special opprobrium based on the speaker's viewpoint. Only knowingly false speech *critical* of peace officer conduct is subject to prosecution under section 148.6. Knowingly false speech *supportive* of peace officer conduct is not similarly subject to prosecution. California "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *See R.A.V.*, 505 U.S. at 392. Because section 148.6 targets only knowingly false speech *critical* of peace officer conduct during the course of a complaint investigation, we conclude that the statute impermissibly regulates speech on the basis of a speaker's viewpoint.[10] *See id.* at 384; *see also Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1094 (C.D. Cal. 2004).

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[10] Because we conclude that section 148.6 discriminates on the basis of viewpoint, we need not reach the remaining arguments offered by Chaker and amicus curiae regarding content discrimination.

At oral argument, the state and amicus curiae in support of the state offered three statutes which they believe regulate knowingly false speech of peace officers during the course of a misconduct investigation: California Penal Code sections 118.1, 132, and 134. They argued that these statutes put peace officers on equal footing with complainants in the course of a complaint investigation. Section 118.1, however, only prohibits an officer from filing a *crime report* if he or she knowingly and intentionally makes any statement regarding any material matter in the report which the officer knows to be false.[11] *See* Cal. Penal Code § 118.1; *see also Walker v. Kiousis*, 93 Cal. App. 4th 1429, 1449 n.2 (2001). We are aware of no authority, nor do the parties direct us to any, holding that a knowingly false statement made by an officer in the course of a misconduct investigation falls within the prohibition of filing a false crime report under section 118.1. Similarly, sections 132 and 134 only prohibit the preparation and offering of forged or fraudulently altered *documents*. *See* Cal. Penal Code §§ 132,[12] 134;[13] *see also*

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[11] California Penal Code 118.1 provides:

> Every peace officer who files any report with the agency which employs him or her regarding the commission of any crime or any investigation of any crime, if he or she knowingly and intentionally makes any statement regarding any material matter in the report which the officer knows to be false, whether or not the statement is certified or otherwise expressly reported as true, is guilty of filing a false report punishable by imprisonment in the county jail for up to one year, or in the state prison for one, two, or three years. This section shall not apply to the contents of any statement which the peace officer attributes in the report to any other person.

[12] Penal Code § 132 provides:

> Every person who upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing

People v. Pereira, 207 Cal. App. 3d 1057, 1068 (1989) ("[Section 134] applies to the *preparation* of a false or antedated *document* with the intent to produce it or allow it to be produced for any fraudulent purpose. [Section 132] applies to the actual *offer in evidence* of a false or fraudulently altered or antedated *document*." (emphasis of "document" added)).

We note that any impermissible viewpoint-based bias present in the complaint investigation process is easily cured: California can make all parties to an investigation of peace officer misconduct subject to sanction for knowingly making false statements. Otherwise, the selective sanction imposed by section 148.6 is impermissibly viewpoint-based.

CONCLUSION

[13] Because Chaker's conviction was obtained under a statute that runs afoul of the First Amendment, we reverse the judgment of the district court, grant Chaker's petition for habeas corpus, and remand for issuance of the writ.

REVERSED AND REMANDED.

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the same to have been forged or fraudulently altered or ante-dated, is guilty of felony.

[13] California Penal Code § 134 provides:

> Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

APPENDIX C

APPENDIX C

[Filed September 24, 2003]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARREN DAVID CHAKER, Petitioner, vs. ALAN CROGAN, SAN DIEGO COUNTY PROBATION DEPARTMENT Respondent.	CASE No. 00cv2137-BTM (BEN) **ORDER:** **(1) ADOPTING IN PART THE FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE;** **(2) DENYING MOTIONS FOR SUMMARY JUDGMENT, FOR AN EVIDENTIARY HEARING AND FOR LEAVE TO CONDUCT DISCOVERY;** **(3) DENYING PETITION FOR WRIT OF HABEAS CORPUS; AND** **(4) ISSUING A LIMITED CERTIFICATE OF APPEALABILITY**

Presently before the Court is a Third Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Petitioner in pro se Darren David Chaker (hereinafter "Petitioner"), challenging a misdemeanor conviction in the San

Diego County Municipal Court for knowingly filing a false allegation of misconduct against a peace officer in violation of California Penal Code § 148.6(a)(1). Also pending are Petitioner's Motions for Summary Judgment, for an Evidentiary Hearing and for Leave to Conduct Discovery. Petitioner seeks summary adjudication with respect to Claim 1 only, requesting the Court to vacate his conviction on the basis that § 148.6(a)(1) is facially unconstitutional under the Free Speech Clause of the First Amendment because it impermissibly discriminates based on content and viewpoint. Respondent has filed an Answer and Oppositions to the motions. Three chapters of the American Civil Liberties Union (San Diego & Imperial Counties, Southern California and Northern California, hereinafter collectively "Amici" or "ACLU"), have filed a joint amici curiae brief in support of Petitioner's motion for summary judgment.

A Report and Recommendation ("R&R") has been submitted by United States Magistrate Judge Roger T. Benitez. The R&R recommends denying habeas relief as to Claim 1, finding that although Cal. Penal Code § 148.6 "probably violates the First Amendment" and "is unconstitutional," this Court is precluded from granting habeas relief because the California Supreme Court upheld the statute against a similar attack in People v. Stanistreet, 29 Cal.4th 497 (2002), cert. denied, 123 S.Ct. 1944 (2003). The R&R concluded that because reasonable jurists can disagree on this issue, habeas

relief is unavailable under 28 U.S.C. § 2254(d). The R&R did not address all of Petitioner's remaining claims but recommended denying habeas relief as to those claims addressed, found that Petitioner's failure to request an evidentiary hearing in state court precludes this Court from conducting one, and concluded that a ruling on the merits of the habeas petition amounted to an implicit denial of the summary judgement motion.

Petitioner has filed Objections ("Obj.") to the R&R, in which he contends only the claims in the second amended petition were addressed rather than the third amended petition, that his discovery motion was not addressed, that evidence presented here which was not before the Stanistreet court was not considered, and objects to the findings with respect to several other claims. The Court has reviewed the R&R pursuant to 28 U.S.C. § 636(b)(l)(C), which provides that "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b)(l)(C) (West 1993).

After a de novo review of the R&R, as well as the Third Amended Petition, Respondent's Answer and Lodgments, the Objections and all other relevant portions of the Court's file, the

Court hereby **ADOPTS** in part the findings, conclusions and recommendations of the Magistrate Judge, **DENIES** Petitioner's Motion for Summary Judgment, **DENIES** Petitioner's Motion for an Evidentiary Hearing and for Leave to Conduct Discovery, **DENIES** the Third Amended Petition for a writ of habeas corpus, and **ISSUES** a Certificate of Appealability limited to Claim 1 as follows.

I. Jurisdiction.

Respondent first contends that although Petitioner satisfied the "in custody" requirement of 28 U.S.C. § 2254 at the time he initiated this action, a "case or controversy" necessary to support Article III jurisdiction has ceased to exist since February 22, 2002, the date Petitioner completed his summary probation.[1] Respondent contends that because Petitioner is no longer under any custodial restraints as a result of his conviction, there is no remedy this Court can provide to Petitioner in the way of relief, and the action is therefore moot. The relief requested by Petitioner in the summary judgment motion is to have this Court enter a declaratory judgment stating that § 148.6 is facially unconstitutional, enter a permanent injunction against its enforcement, and vacate his conviction;

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[1] Petitioner was convicted on February 22, 1999 following a jury trial. (R&R at 1.) He was sentenced to three years summary probation and two days of custody, and was fined and ordered to make restitution totaling $1124. (Id. at 1-2.)

the relief requested in the Third Amended Petition is, inter alia, to "be discharged from his unconstitutional conviction and any and all potential consequences." (Third Amended Petition [Docket No. 30] at 6; Supp. Mem. P&A in Support of MSJ [Docket No. 59] at 25.)

The Magistrate Judge found that an irrebutable presumption of collateral consequences applies even to misdemeanor convictions, precluding a finding of mootness here. (R&R at 2.) The Magistrate Judge relied on Chacon v. Wood, 36 F.3d 1459 (9th Cir. 1994) and Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) for this proposition. The Court agrees with and adopts the Magistrate Judge's finding in this regard. Chacon and Larch are controlling and preclude this Court from finding this case to be moot. Although it is clear on the merits that Petitioner is not entitled to the relief he seeks, it is unclear what, if any, remedy this Court could provide Petitioner, who, according to Respondent, is no longer under custodial constraints of any kind as a result of his conviction. See Larch, 52 F.3d at 1070 (following but questioning the holding of Chacon and citing Fay v. Noia, 372 U.S. 391, 430-31 (1963) ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power.")); Flast v. Cohen, 392 U.S. 83, 96 & n.14 (1968) (the rule against advisory opinions is "the oldest and most consistent thread in the federal law of justiciability" and has been adhered

to without deviation since it was established as early as 1793). However, the Court need not reach the question of what remedy would be appropriate because the claims fail on the merits.

II. Summary adjudication/merits of Claim 1.

Petitioner seeks summary adjudication with respect to Claim 1 in the Third Amended Petition. Petitioner contends in Claim 1 that Cal. Penal Code § 148.6(a), which provides that "[e]very person who files any allegation of misconduct against any peace officer . . . knowing the allegation to be false is guilty of a misdemeanor," restricts freedom of speech guaranteed by the First Amendment because it impermissibly discriminates on the basis of the content of the speech it regulates, and impermissibly targets only citizen complaints against peace officers as distinct from any other public official. (Memorandum of Points and Authorities in Support of Third Amended Petition[2] ("Pet. Mem.") [Docket No. 31] at 2-3.) Petitioner contends § 148.6(a) violates the First Amendment because it does not fit within one of the three exceptions to content- and viewpoint-based restrictions identified in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). Amici ACLU support

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[2] Although the first page of this document indicates that it is a Memorandum of Points and Authorities is support of the Second Amended Petition, it was directed to be filed contemporaneously with the Third Amended Petition and is obviously intended to support that version of the petition. (See Order Granting Permission to Filed Third Amended Petition, filed April, 25, 2002 [Docket No. 32].)

Petitioner's position that § 148.6(a) is facially unconstitutional under the First Amendment, arguing that it impermissibly discriminates based on content and viewpoint and does not fall within any of the R.A.V. exceptions, but restrict their argument to the application of the recently decided Virginia v. Black, –U.S.–, 123 S.Ct 1536 (2003). (Amici Brief [Docket No. 82] at 1-2.)

Respondent contends that the federal district court decisions Petitioner relies on which have questioned the constitutionality of § 148.6(a) are flawed in that they have either been reversed or rely in part on cases which have been reversed.[3] (Opp. to MSJ [Docket No. 55] at 4.) Respondent contends that the only remaining case to consider the constitutionality of § 148.6(a) is People v. Stanistreet,

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[3] These cases include the two the Magistrate Judge found to be persuasive and well-reasoned Hamilton v. City of San Bernardino, 107 F.Supp.2d 1239 (C.D. Cal. 2000) (holding in 42 U.S.C. § 1983 action that § 148.6 violates the First Amendment because it does not fall within one of the three R.A.V. categories), and Eakins v. State of Nevada, 219 F.Supp.2d 1113 (D.Nev.2002) (holding in § 1983 action that Nevada statute which is functional equivalent of § 148.6 violates the First Amendment because it does not fall within one of the three R.A.V. categories), as well as Gritchen v. Collier, 73 F.Supp.2d 1148 (C.D. Cal. 1999) (holding in § 1983 action that "civil equivalent" of § 148.6 (Cal. Penal Code § 47.5) violates First Amendment because it does not fall within one of the three R.A.V. categories), reversed on other grounds, 254 F.3d 807 (9th Cir. 2001), and Haddad v. Wall, 107 F.Supp.2d 1230 (C.D. Cal.2000) (same), vacated on other grounds, 48 Fed.Appx. 279 (9th Cir. 2002) (unpublished memorandum).

29 Cal.4th 497 (2002), cert. denied, 123 S.Ct 1944 (2003), in which the California Supreme Court upheld the statute against the same First Amendment challenge presented here. Amici reply that Virginia v. Black, decided after Stanistreet, "exposes the flaws" in Stanistreet's reasoning. (Amici Brief at 2.)

Petitioner is entitled to summary adjudication of Claim 1 if there is no genuine issue of material fact and Petitioner is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, Petitioner must demonstrate there is no genuine issue regarding whether the state court's adjudication of Claim 1 satisfied the standards of 28 U.S.C. § 2254(d), which provides that habeas relief is not available with respect to any claim adjudicated on the merits by the state court unless that adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C.A. § 2254(d)(1)-(2) (West Supp. 2003).

A state court's decision may be found to be "contrary to" clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in the Court's cases or confronts a set of materially indistinguishable facts and arrives at a result different from the Court's precedent.

Williams (Terry) v. Taylor, 529 U.S. 362, 405-06 (2000). A state court decision may involve an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. Id. at 407. This Court may not issue the writ simply because it concludes in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; that application must be objectively unreasonable. Lockyer v. Andrade, __U.S.__, 123 S.Ct. 1166, 1175 (2003).

Because summary judgment is not appropriate where additional discovery is necessary, Maliack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 888 (9th Cir. 1996), the first issue which must be addressed is Petitioner's motion for an evidentiary hearing and for leave to conduct discovery. See Klingele v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988) (Summary judgment is disfavored where relevant evidence remains to be discovered, but is appropriate if further discovery will not elicit evidence that would raise genuine issues of material fact). Petitioner contends in the discovery motion that discovery is necessary to support Claims 1-5, 10 and 13 of the Third Amended Petition, and

requests any and all papers lodged with the superior court pertaining to his case, any and all internal memorandum or other items generated by the El Cajon Police Department "that prove or disprove the factual background of vindictive and/or malicious prosecution," and the file retained by Petitioner's appellate counsel. (Motion for Evidentiary Hearing [Docket No. 77] at 5-6.) However, in the summary judgment motion, Petitioner contends there is no need for discovery as to Claim 1. (MSJ [Docket No. 45] at 10.) Respondent contends that Petitioner has failed to allege sufficient facts to entitle him to an evidentiary hearing or to conduct discovery, and that his motions should be denied because the petition can be decided on the present record. (Respondent's Opposition [Docket No. 86] at 10-12.) With respect to Claim 1, Respondent contends the constitutionality of § 148.6(a) is purely a legal question and further factual development of the record is unnecessary. (Id. at 12.)

The Magistrate Judge found that Petitioner was not entitled to an evidentiary hearing, and that an explicit ruling on the summary judgment motion was therefore unnecessary, because Petitioner had never sought an evidentiary hearing in state court, citing Williams (Michael) v. Taylor, 529 U.S. 420 (2000) (finding that 28 U.S.C. § 2254(e)(2) provides that a district court may not conduct an evidentiary hearing where petitioner has failed to develop the factual basis for a claim in the state courts due to a lack of diligence). (R&R at 7, n. 11.) Petitioner

objects to the finding that he did not seek to obtain state court records. (Obj. at 75.) Additionally, Petitioner contends in his motion that he requested leave to conduct discovery and requested an evidentiary hearing in the state court. (Motion for Evidentiary Hearing [Docket No. 77] at 3.) Petitioner has submitted a letter stamped "Received" by the California Supreme Court, through which he supplements his habeas petition filed in that court, and in which he complains of the denial of a Pitchess[4] motion and his trial counsel's failure to have the trial or the pretrial motion proceedings transcribed. (Petitioner's Notice of Lodgment [Docket No. 37] at 48-49.) The record also contains a discovery motion filed by Petitioner's trial counsel in his criminal case (Respondent's Motion to Dismiss [Docket No. 7] Ex. C at C1 -12), as well as a petition for a writ of mandate filed by Petitioner, and an order denying same, seeking mandamus to require the state court to reconsider the denial of the Pitchess motion (id. at C32-45). Therefore, the Court declines to adopt the findings that Petitioner is not entitled to discovery, an evidentiary hearing or an explicit ruling on his summary judgment motion due to a lack of diligence in attempting to develop the factual basis of

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[4] Referring to Pitchess v. Superior Court, 11 Cal.3d 531 (1974), which provides for discovery of police officer personnel records. See City of Los Angeles v. Superior Court, 96 Cal.App.4th 255, 259-260 (2002) (describing procedures for deciding a Pitchess motion).

his claims in the state courts. See Williams (Michael), 529 U.S. at 430 (finding that a lack of diligence is implied in "failure to develop" language of 28 U.S.C. § 2254(e)(2)). The Court will consider these matters in the first instance.

The Magistrate Judge found § 148.6 "probably violates the First Amendment [because] the statute impermissibly discriminates on the basis of the content of the speech which it regulates and is both impermissibly vague and overbroad," and "is unconstitutional because the ordinance does not fall within any of the exceptions to the rule against content and viewpoint discrimination" set forth in R.A.V. v. City of St. Paul, 505 U.S. 377, 388-90 (1992). (R&R at 10 & n.17.) In support of this finding the Magistrate Judge determined that, if free to do so, he "would agree with and adopt the persuasive and well-reasoned opinions of Eakins [v. State of Nevada, 219 F.Supp.2d 1113 (D. Nev. 2002)] and Hamilton [v. City of San Bernardino, 107 F.Supp.2d 1239,1248 (C.D. Cal. 2000)] and hold § 148.6 to be unconstitutional," but found that because the California Supreme Court in Stanistreet concluded the statute "passed constitutional muster," reasonable jurists can obviously differ as to the constitutionality of § 148.6, precluding a finding that the California Supreme Court's rejection of Petitioner's claim was objectively unreasonable. (R&R at 12-14.)

The Court cannot adopt these findings. The "reasonable jurists" standard applied by the Magistrate Judge has been

specifically rejected by the Supreme Court. Williams (Terry), 529 U.S. at 389 ("[§ 2254(d)] directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law."). Rather, this Court is obligated to exercise its independent judgment regarding whether Petitioner's conviction violated the federal Constitution after carefully weighing all the reasons for a state court's judgment and determining whether that judgment was objectively unreasonable. Id.; Andrade, 123 S.Ct. at 1175.

Here, Petitioner presented Claim 1 to the California Supreme Court in a habeas petition filed on September 10, 2001. (Respondent's Response to Order for Further Lodgments [Docket No. 40] Ex. A at A10.) That petition was denied by an Order filed February 27,2002, which stated in full:

> Petition for writ of habeas corpus is DENIED. (See *In re Clark* 1993) 5 Cal.4th 750; *In re Swain* (1949) 34 Cal.2d 300, 304, *In re Dixon* (1953) 41 Cal.2d 756, *In re Lessard* (1965) 62 Cal.2d 497, 503, *In re Duvall* (1995) 9 Cal.4th. 474, and *In re Lindley* (1947) 29 Cal.2d 709.)

(Id. at A1.)

To the extent the R&R discerned from the state supreme court's order, which was filed on February 27, 2002, that it was based on the same reasoning as Stanistreet, which was not decided until December 5, 2002, this Court declines to adopt that finding. The reasons set forth in the state supreme court's

opinion for denying Petitioner's claim are procedural rather than substantive.[5] However, it is clear that, to the extent these cases could support a procedural default, Respondent has waived that defense by failing to assert it, Cockett v. Ray, 333 F.3d 938, 942 (9th Cir. 2003), and that this Court must treat the state supreme court's decision as neither a denial on the merits of the claim nor on procedural grounds. See Ylst v. Nunnemaker, 501 U.S. 797, 805-06 (1991). Finally, the R&R did not address Amici's position that the United States Supreme Court decision in Virginia v. Black, decided after Stanistreet, "exposes the flaws" in the Stanistreet analysis.

Thus, the Court will decide the summary judgment motion and the merits of Claim 1 in the first instance. As the Ninth Circuit recently pointed out, application of the § 2254(d) standards:

> . . . is significantly impeded where, as here, the state court supplies no reasoned decision. *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000). We

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[5] The cases cited refer to state procedural rules against filing successive and untimely habeas Petitions, presenting claims on habeas which should have been raised on direct appeal, failing to state claims with particularity, failing to plead reasonably available facts, and providing that a defendant may not collaterally attack a final judgment upon the ground that the trial court has accepted evidence which assertedly has been obtained illegally. See Park v. California, 202 F.3d 1146 (9th.Cir. 2000); Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986); In re Lessard, 62 Cal.2d 497, 503 (1965); People v.Duvall, 9 Cal.4th 464 (1995).

> "cannot perform our evaluation under the models suggested by Justice O'Connor in *Williams*," because we have "no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context." *Delgado*, 223 F.3d at 981-82. *Delgado* therefore instructs us to perform an "independent review of the record" to ascertain whether the state court decision was objectively unreasonable. *Id.* at 982. Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable. *See id.*

Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

An independent review of the record reveals the following pertinent facts.[6] Petitioner sent a letter titled "Complaint" to the El Cajon Police Department Internal Affairs Division, dated March 23, 1997, which alleged that his arrest on April 9, 1996, by Detective Bradberry involved "unlawful arrest," "excessive force"and "search without cause." (Engrossed Settled Statement on Appeal, Answer[7] [Docket No. 18] Ex. B at B32, 41-42.)

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[6] The facts are viewed in the light most favorable to the Respondent with respect to the summary judgment motion, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), as well as with respect to Petitioner's claim that insufficient evidence was adduced to support his conviction, Jackson v. Virginia, 443 U.S. 307, 319 (1979), and are presumed to be correct unless rebutted by clear and convincing evidence, 28 U.S.C. § 2254(e)(l).

[7] The Answer to the First Amended Petition is the only Answer on file. After the Answer was filed, Petitioner filed a Second Amended

Petitioner had previously submitted a City of El Cajon Claim for Damages form on August 15, 1996, where he requested $25,000 in damages and claimed he complied with Bradberr during the April 9, 1996 arrest, but that Bradberry nevertheless twisted his wrist and hit him in the ribs, and that he hit his head on the dashboard of the van transporting him to the police station when the van stopped suddenly because Bradberry had not placed a seat belt on him. (Id. at B33.)

A misdemeanor complaint was filed against Petitioner on March 25,1997, accusing him of unlawfully filing an allegation of misconduct against a peace officer knowing the allegation to be false, in violation of Cal. Penal Code § 148.6(a)(l). (Id. at B27.) Petitioner's first trial resulted in a hung jury, and he was found guilty on February 22, 1999, following a second trial.

The People were permitted to admit a statement in evidence that Petitioner had made to an attorney representing an El Cajon Police Officer and the City of El Cajon in an unrelated civil lawsuit brought by Petitioner. Petitioner told the attorney

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Petition which was withdrawn prior to a response. Petitioner thereafter filed the operative Third Amended Petition, and later abandoned Claims 6-8 and 10-11 in that petition. Claims 1, 9, 12 and 13 in the Third Amended Petition were not presented in the First Amended Petition and are not addressed in the Answer. Respondent has instead addressed the merits of Claim 1 in the opposition to Petitioner's summary judgment motion, and has addressed Claims 9, 12 and 13 in the Motion to Dismiss the Third Amended Petition [Docket No. 34].

that, "if all that happens in the case is that the City of El Cajon has to pay your fee of $20,000, and that prevents the City from purchasing one or two patrol cars, then that is an acceptable result to me." (Id. at B28.) The People were also permitted to introduce evidence that Petitioner had filed a civil lawsuit against Bradberry for slander which allegedly occurred on April 11, 1996, but that the lawsuit did not contain an allegation of excessive use of force in the arrest on April 9, thereby implying Petitioner had fabricated the complaint of excessive force in the March 23 complaint letter. (Id.)

The court precluded the introduction of evidence that Petitioner had previously been declared a vexatious litigant and had filed ten or twelve other lawsuits against various law enforcement agencies in San Diego County. (Id. at B28-29.) The court also excluded evidence that Petitioner told the director of Grossmont College that he was taking criminal justice courses because he wanted to learn how to sue police better, and that Bradberry was being investigated in an unrelated wrongful death shooting. (Id. at B28.)

An eyewitness to Petitioner's arrest, a clerk at the Postal Convenience Center where Petitioner arrived to pick up his mail at the same time Bradberry was questioning the clerk as to Petitioner's whereabouts, testified that she clearly saw the entire arrest procedure, which was completely professional, and that she observed no excessive force used or heard any complaint by

Petitioner during the arrest. (Id. at B29-31.) A police officer from the Internal Affairs Division testified to the potential damage a citizen complaint against a police officer can have on the officer's career, and testified that Petitioner had filed another unrelated complaint alleging excessive use of force against another officer. (Id. at B31-32.) This witness also testified that Petitioner had described Bradberry's conduct in the complaint as "unlawful use of force. Det. Bradberry (sic) did use force by hitting me, twisting wrist, when he arrested me . . . (o)n or about April 8, 1996 (sic) @ 1p.m. I complied to arrest but Det. Bradberry (sic) hit me on my ribs anyway . . . Det. Bradberry's (sic) use of force damaged my wrist, ribs . . . Det. Bradberry (sic) did not seat belt me in when transported - he braked so I hit the dashboard." (Id. at B33.) A police officer who was with Bradberry at the time of Petitioner's arrest testified that nothing Bradberry did during the arrest was unprofessional, he did not see Bradberry hit Petitioner in the ribs, twist his wrist or see Petitioner hit his head on the van nor complain of any pain. (Id. at B33-35.)

Bradberry testified that he had not expected to encounter Petitioner at the Postal Convenience Center and had left his service revolver in the police van. (Id. at B36-37.) Because Bradberry was unarmed, Bradberry grabbed Petitioner's wrist in case Petitioner reached for a weapon; Bradberry applied "minimal pressure at most" in arresting Petitioner, who did not

resist at all and did not complain about any pain. (Id. at B37.) Bradberry testified that Petitioner was seat-belted in and at no time did he fly forward and hit his head during a stop. (Id.) Bradberry testified on cross that Petitioner has filed five complaints against him. (Id.) Petitioner was asked but denied having any injuries when he was processed into the jail that day. (Id. at B39.) There was conflicting testimony regarding whether Bradberry flew into a rage and verbally assaulted Petitioner on one occasion when Bradberry was served with a lawsuit filed by Petitioner while in open court. (Id. at B39-43.) Petitioner testified that when he was half-way into the van, Bradberry realized his service revolver was on the floor of the van and pulled Petitioner back out; as he was being pulled out, Petitioner suffered minor injuries to his head and ribs when he bumped his head on the van; he did not report the injuries at the jail intake because he assumed they meant serious injuries. (Id. at B40-41.)

It is clear that the record is sufficiently developed to rule on the summary judgment motion at this time, that Petitioner has failed to identify any additional discovery needed with respect to any claim presented in the Third Amended Petition, and that Petitioner is not entitled to an evidentiary hearing. Petitioner merely requests any and all papers lodged with the superior court pertaining to this case, any and all internal memorandum or other items generated by the El Cajon Police

Department "that prove or disprove the factual background of vindictive and/or malicious prosecution," and the file retained by Petitioner's appellate counsel. (Motion for Evidentiary Hearing [Docket No. 77] at 6.) Petitioner's failure to specify what documents would be found among these materials and how their production would have any effect on the resolution of his summary judgment motion or Claim 1 precludes granting his motion for discovery, Campbell v. Blodgett, 982 F.2d 1356, 1357 (1993), or delaying resolution of the summary judgement motion pending discovery, Federal Savings and Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 903 (9th Cir. 1989), or conducting an evidentiary hearing, Rich v. Calderon, 187 F.3d 1064, 1068-69 (9th Cir. 1999). Therefore, a ruling on the summary judgment motion is appropriate at this time, and Petitioner's motion for an evidentiary hearing and for leave to conduct discovery is denied.

In order to carry his burden of demonstrating that he is entitled to judgment as a matter of law with respect to Claim 1, Petitioner must demonstrate that there is no genuine issue of material fact in dispute regarding whether the state court's denial of Claim 1 was contrary to, or an objectively unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. All parties to this action agree that the "clearly established federal law" with

respect to this claim is set forth in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), although Amici contend that decision has been clarified by Virginia v. Black, 123 S.Ct. 1536 (2003), and the parties agree that Garrison v. Louisiana, 379 U.S. 64 (1964) is relevant precedent.

The Supreme Court set forth the minimum standard applicable to criminalizing false or defamatory speech against public officials in Garrison v. Louisiana, 379 U.S. 64 (1964). The Court in Garrison extended the "actual malice" standard from New York Times v. Sullivan, 376 U.S. 254 (1964) to strike down a criminal defamation statute where malice was presumed from lack of a justifiable motive, and held that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." Garrison, 379 U.S. at 74. This Court finds that § 148.6(a) is consistent with Garrison, as the People are required to prove beyond a reasonable doubt that a defendant knew the allegation of misconduct was false at the time the defendant made the complaint, a standard higher than the New York Times actual malice test, and that the type of speech at issue, knowingly false complaints against peace officers, is proscribable consistent with the First Amendment. R.A.V., 505 U.S. at 382; Stanistreet, 29 Cal.4th at 506. All parties agree the issue here is whether the decision by the California legislature to make § 148.6(a)

applicable to peace officers only, and not other public officials, renders the statute impermissibly content- and viewpoint-based.

In R.A.V. v. City of St. Paul, the Court addressed the First Amendment implications arising when a particular type of otherwise proscribable speech is criminalized under some, but not all, circumstances. The petitioner in R.A.V. was charged with burning a cross in the yard of an African-American family under an ordinance which made it a misdemeanor to burn a cross where one knows it "will arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." R.A.V., 505 U.S. at 379-80. The Supreme Court found the ordinance discriminated on the basis of content by "impos[ing] special prohibitions on those speakers who express views on disfavored subjects," and that such content-based distinctions violate the First Amendment because "[t]he government may not regulate use based on hostility-or favoritism-towards the underlying message expressed." Id. at 386, 391. Although Garrison had made clear that, "the knowingly false statement and the statement made with reckless disregard for the truth, do not enjoy constitutional protection," 379 U.S. at 75, the Court in R.A.V. stated, for the first time, that such statements "must be taken in context," and:

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)-not that they are

> categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 384-85.

The R.A.V. Court held that content- or viewpoint-based discrimination within a proscribable area of speech must fit within one of three exceptions: (1) "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists"; (2) "the subclass of proscribable speech . . . happens to be associated with particular 'secondary effects' of the speech, so that the regulation is justified without reference to the content of the. . . speech"; and (3) a catchall category where "to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id. at 388-90.

In Virginia v. Black, 123 S.Ct. 1536 (2003), the Court considered a First Amendment challenge to an ordinance which made it criminal to burn a cross in order to intimidate anyone for any reason. The Court found that, unlike the statute in

R.A.V., "the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'" Black, 123 S.Ct. at 1549. Although a plurality of the Court found that an evidentiary provision of the statute, as interpreted through the jury instructions (which provided that the burning of a cross was prima facie evidence of an intent to discriminate) rendered it unconstitutional, id. at 1550-52, as to the prohibition on cross burning itself, a majority of the Court concluded that:

> The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment. Id. at 1549-50.

The statute at issue in the instant case makes it a misdemeanor to knowingly make a false complaint against a peace officer. The legislative history was summarized by the California Appellate Court in San Diego Police Officer's Assn.

v. San Diego Police Dept., 76 Cal.App.4th 19, 22-23 (1999), as follows:

> Prior to section 148.6's enactment in 1995, existing law made it a misdemeanor to knowingly make a false report of a crime. (§ 148.5.) However, courts held that section 148.5 did not apply to *citizens' complaints of police misconduct*, even where the alleged misconduct amounted to violations of criminal laws. (*Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 83, 157 Cal.Rptr. 584 (allegations of police brutality and battery during an arrest); *People v. Craig* (1993) 26 Cal.Rptr.2d 184, 21 Cal.App.4th Supp. 1, 3, 6 (allegations of theft of $500 by police during an arrest).) The Legislature noted that since the Rodney King incident in March 1991, law enforcement agencies throughout the state had "revised their citizen complaint procedures to promote greater accountability on the part of their line officers." (Assem. Com. On Public Safety, Analysis of Assem. Bill No. 1732 (1995-1996 Reg. Sess.).) However, a "glaringly negative side-effect which has resulted (was) the willingess on the part of many of our less ethical citizens to maliciously file false allegations of misconduct against officers in an effort to punish them for simply doing their jobs." (*Ibid.*) Against this backdrop, the Legislature enacted section 148.6, in an attempt to curb a perceived rising tide of knowingly false citizens' complaint of misconduct by officers performing their duties.

Amici contend that making a knowingly false complaint against a peace officer is not the same type of "particularly virulent form" of sending a message which the Black Court identified with cross burning, which was in essence a form of a

true threat, Thus, Amici contend that Black reinforced the purpose behind the R.A.V. rule, to prohibit instances where the government singles out for approbrium speech directed at a specific disfavored topic. The Black Court made clear that the distinction between the unconstitutional cross burning ordinance in R.A.V. and the constitutional ordinance in Black, was the targeting of speech directed toward a "specified disfavored topic,"such as intimidation based on race, color, creed, religion or gender in R.A.V., which was not present in the Black ordinance, which was directed at cross-burning done with the intent to intimidate anyone for any reason. Black, 123 S.Ct. at 1549. The Black Court observed that the ordinance fell within the first R.A.V. category, finding that the reason why the speech was distinguished from other speech, because cross-burning is a particularly virulent form of intimidation, was the same reason the speech was proscribable. Black, 123 S.Ct. at 1549-50; R.A.V., 550 U.S. at 388. Thus, clearly established Supreme Court precedent provides that in order for California to single out knowingly false complaints against peace officers for special prohibition, this proscribable area of speech, directed as it is to the "specified disfavored topic" of complaints against peace officers, must fall within one of the three R.A.V. categories.

The first R.A.V. category provides that, "when the basis for the content discrimination consists entirely of the very

reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." R.A.V., 505 U.S. at 388. The parties agree that this category requires the reason for the content-based distinction (between peace officers and other public officials) to be the same as the reason why the speech is prohibited in the first place. An example given by the Court in R.A.V. is the law criminalizing only those threats of violence directed against the President of the United States, where the reasons why the threats are outside the First Amendment (protecting individuals from fear of violence, from the disruption caused by that fear and from the possibility the threatened violence will occur), have special force when applied to the person of the President due to the overwhelming interest in protecting the safety of the Chief Executive. Id. Congress would not be permitted to criminalize only those threats which mentioned the President's policy on aid to inner cities, however. Id. Another example given by the R.A.V. Court is that regulation of obscenity directed only at its most patently offensive form is acceptable, but it would be unacceptable for a regulation to be directed only at a form of obscenity which includes offensive political messages. Id.

Respondent identifies, as a reason for the singling out of peace officers, the unique position of peace officers in the manner in which they interact with individuals in the community, which in turn gives rise to the increased

opportunity for individuals to lodge complaints against the peace officers, a position other public officials do not share. (Opp. to MSJ [Docket No. 55] at 7-9.) False complaints against police officers consume resources through the investigation of the complaints, which is increased by the fact that complaints can cause the peace officer to be placed on administrative leave pending investigation or hold up promotions, with a concomitant adverse impact on the effectiveness of the police force. (Id.)

Petitioner contends that the reason the speech at issue here, defamatory speech, is proscribable, is due to the injury to reputation flowing from defamatory speech. He contends the first R.A.V. exception does not apply because the reason for protecting officials from injury to their reputation does not apply to peace officers with any special force, and therefore "the basis for the content discrimination does not consist entirely of the very reason the entire class of speech at issue is proscribable." R.A.V., 505 U.S. at 388. Amici agree and contend these concerns are not unique to peace officers, who have other protections from false complaints, thereby undermining the rationale (injury to reputation) permitting knowingly false complaints against peace officers to be proscribed. (Amici Brief at 10-12.) Petitioner has lodged the declarations of Samuel Walker, Professor of Criminal Justice at the University of Nebraska at Omaha, and Mary C. Dunlop, the

Director of the City and County of San Francisco's Office of Citizen Complaints, both of whom opine that § 148.6 has a chilling effect on truthful citizen complaints of police misconduct and is unnecessary to protect peace officers in light of other procedural protections in place to protect peace officers from false allegations of misconduct. (Pet.'s Motion for Judicial Notice [Docket No. 64] Exs. A & B.)

The Court rejects Petitioner's contention that the only permissible reason why the speech at issue here is proscribable is due to the injury to reputation flowing from defamatory speech. The California legislature recognized as a justification for the statute that unscrupulous citizens were taking advantage of the more open and available citizen complaint procedures, which were put in place following the Rodney King incident in order to "promote greater accountability on the part of their line officers," to file false and malicious complaints in an effort to punish officers for doing their jobs. San Diego Police Officer's Assn., 76 Cal.App.4th at 23. Knowingly false complaints against peace officers take advantage of these open complaint procedures and detract from, rather than advance, the interest in addressing abuses of police power. Such complaints hinder the ability to address abuses of police power, which is compounded by the effects of false complaints identified by Respondent.

Thus, the basis identified by Respondent for distinguishing peace officers from other officials here is their increased and

particular vulnerability to the effects of false complaints (both because of the open complaint procedures and the nature of their job), which has arisen from or been exacerbated by the openness of the complaint procedures perceived as necessary to protect citizens from the abuse of police power. This is the same reason the entire class of speech here is proscribable, which is because knowingly false allegations of misconduct by public officials hampers California's ability to promote greater accountability of peace officers' use of police power. As the Court observed in Garrison:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031. Hence the knowingly false statement and

> the false statement made with reckless disregard of the truth, do not enjoy constitutional protection

Garrison, 379 U.S. at 75.

Although this Court is addressing a content-based restriction on the otherwise proscribable "calculated falsehoods" of knowingly false allegations of misconduct filed against peace officers, clearly established federal law does not restrict the reason for proscribing that speech to the injury flowing from defamation as Petitioner contends. Rather, the reason may encompass the one identified in Garrison, that intentionally false allegations against public officials are proscribable consistent with the First Amendment because, "those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration [use a tool which] is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Garrison, 379 U.S. at 75. The reason identified by the California legislature, "the willingness on the part of many of our less ethical citizens to maliciously file false allegations of misconduct against officers in an effort to punish them for simply doing their jobs," San Diego Police Officer's Ass'n., 76 Cal.App.4th at 23, fits within this definition.

Petitioner contends in his Objections that the fact California has chosen to impose special administrative burdens on itself should have nothing to do with the reason why the speech at issue here is proscribable. (Obj. at 36.) However, it is not the special administrative burden California has placed on itself which gives rise to the reason why the speech is proscribable. Rather, this factor goes to the basis for the content discrimination. The Court similarly rejects Petitioner's reliance on Hamilton v. City of San Bernardino, 107 F.Supp.2d 1239 (C.D. Cal. 2000) for the proposition that personal injury flowing from defamation is the only reason why the speech here is proscribable. The District Court in Hamilton identified the reason why the speech within § 148.6's reach is proscribable as injury to the reputation of the individual officer flowing from defamation, relying on Gritchen v. Collier, 73 F.Supp.2d 1148, 1152 (C.D. Cal. 1999), reversed, 254 F.3d 807 (9th Cir. 2001), and then went on to discuss the underlying reasons defamation may be proscribed. However, Gritchen dealt with Cal. Penal Code § 47.5, which creates a specific exception for peace officers to the general rule providing that citizen complaints against public officials cannot form the basis of a libel or defamation action by the official against the citizen complainant. Id. at 1151-52. There is no such restriction in § 148.6(a), which is not limited to defamatory complaints. Although any knowingly false complaint against a peace officer

regarding actions taken within the scope of the officer's duty may be considered defamatory, there is no basis to conclude that the injury to the reputation of Detective Bradberry flowing from Petitioner's defamatory complaint is the sole reason why such complaints may be proscribed consistent with the First Amendment. Rather, the reason given by the California legislature, the adverse effect such complaints have on holding peace officers accountable for abuses of police power, is consistent with Garrison and is compelling.

An independent review of the record in the instant case demonstrates that the reasons identified in Garrison and San Diego Police Officer's Ass'n are particularly applicable here. The record demonstrates that Petitioner admitted at trial that he had sent in and signed the complaint against Bradberry under penalty of pe jury, and that he had previously filed a $25,000 claim for damages, which he also signed under penalty of perjury, stating that Bradberry had hit him in the ribs, and that Petitioner had struck his head when Bradberry applied the breaks on the police van without placing a seat belt on Petitioner. (Engrossed Settled Statement on Appeal, Answer Ex. B at B33, 40-42.) However, Petitioner testified at trial that he hurt his head and ribs when Bradberry was pulling him out of the van. (Id. at B40-41.) Petitioner's testimony came after other testimony which had established that Petitioner had been seat-belted in during the trip to the police station, and after two

eyewitnesses, one completely neutral, testified that Bradberry had not hit or otherwise abused Petitioner during the arrest procedure in any way. (Id. at B29-35.) The jury also head testimony that Petitioner had filed five previous complaints against Bradberry, and that he had filed a civil lawsuit against Bradberry based on an incident which took place two days after the arrest but which did not include allegations of excessive use of force in the arrest. (Id. at B28, 37-38.)

Because sufficient evidence exists to support Petitioner's conviction, this Court must respect the jury's finding that Petitioner knew the allegations were false at the time he filed the complaint. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Thus, the record supports a finding that Petitioner was prosecuted for the reasons identified by the California legislature in enacting § 148.6(a), because Petitioner's use of the citizen complaint procedure, which citizens are encouraged to use in order to assist in addressing abuses of police power, to make knowingly false allegations against a peace officer for actions taken during an arrest, detracts from the ability to address abuses of police power by peace officers.

Accordingly, based on an independent review of the record, the Court finds that the state court's rejection of Claim 1 was neither contrary to, nor involved an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of

the evidence presented in state court, because the reason why knowingly false complaints against peace officers are proscribable consistent with the First Amendment (the use of a known lie is at odds with the premise of democratic government and with the orderly manner in which social or political change is to be effected), is the same as the basis for the content-based distinction identified by the California legislature (use of known falsehoods in the more open and accessible citizen complaint procedures determined to be necessary to address abuses of police power hinders the ability to address abuses of police power), and § 148.6(a) therefore falls within the first R.A.V. category.

Because the Court finds that Cal. Penal Code § 148.6(a) falls within the first R.A.V. category, and it was therefore not objectively unreasonable for the state court to reject Petitioner's claim, the Court need not determine whether the statute falls within the other R.A.V. categories or survives strict scrutiny. R.A.V., 505 U.S. at 395 (holding that even it the statute did not fall within one of the three categories, it would still pass constitutional muster if it were narrowly tailored to serve a compelling state interest).

Based on an independent review of the record, the Court finds that Petitioner has failed to demonstrate that the denial of Claim 1 by the state supreme court was contrary to, or involved an unreasonable application of, clearly established federal law,

or was based on an unreasonable determination of the facts in light of the evidence presented in the state courts. Habeas relief is therefore **DENIED** with respect to Claim 1, as is Petitioner's motion for summary judgment. However, Petitioner has satisfied the standard for issuance of a Certificate of Appealability with respect to Claim 1. Lambright v. Stewart, 220 F.3d 1022, 1024-25 (9th Cir. 2000) (providing that threshold "substantial showing of the denial of a constitutional right," is met by demonstrating that: (1) the issues are debatable among jurists of reason; or (2) that a court could resolve the issues in a different manner; or (3) that the questions are adequate to deserve encouragement to proceed further). As set forth below, none of the remaining claims meet this standard. Therefore, the Court **ISSUES** a Certificate of Appealability limited to Claim 1 in the Third Amended Petition.

III. Claim 2.

Petitioner contends in Claim 2 that he was denied his Sixth Amendment right to self-representation at trial when he filed a declaration with the trial court explicitly invoking his right to self-representation, which was denied on the basis that it was a delaying tactic and he was adequately represented. (Pet. Mem. at 4.) Petitioner presented this claim to the state supreme court in a habeas petition filed on December 26, 2000. (Affidavit of William D. Holman [Docket No. 10] Ex. D at D2.) Petitioner contended in that petition, and here, that he had filed a

declaration (id. at D12) requesting to represent himself in the trial court, and that the trial judge refused his request because it would delay the proceedings and because Petitioner was already adequately represented. (Id. at D8; Pet. Mem. at 4, 23.)

The state supreme court denied Claim 2 with an order filed on March 28, 2001. (Affidavit of William D. Holman [Docket No. 10] Ex. D at Dl .) That Order stated in full:

> Petition for writ of habeas corpus is DENIED. (See *In re Clark* (1993) 5 Cal.4th 750; *In re Swain* (1949) 34 Cal.2d 300,304; *In re Miller* (1941) 17 Cal.2d 734; *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756.)

The record does not indicate whether Petitioner presented this claim to any other state court. (See Affidavit of William D. Holman [Docket No. 10] at p. 4 and Ex. D at D23-28; Respondent's Motion to Dismiss [Docket No. 8] Ex. A at A2-3.) Because there is no lower state court opinion addressing the merits of Claim 2 to which the Court could "look through" the state supreme court's denial, the Court must conduct an independent review of the record to determine whether the state court's denial of the claim was objectively reasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

Petitioner is not entitled to habeas relief in this Court because he has failed to demonstrate that the state court's denial of the claim was contrary to, or based on an unreasonable application of, clearly established federal law, or involved an

unreasonable determination ofthe facts in light of the evidence presented in the state courts. Although Petitioner alleged in the first habeas petition filed in the state supreme court that "the declaration was never filed with the court" (see Affidavit of William D. Holman [Docket No. 10] Ex. A at A-9 ¶ 4), that allegation is at odds with his allegations in the second habeas petition filed in that court where he stated that the declaration was filed but the court "failed to entertain the petitioner's invocation of said right because the Court felt it would delay the proceedings even longer and had no legitimate reason since petitioner was adequately represented" (id. at D8). Similarly, Petitioner has alleged under penalty of perjury in this Court both that his declaration was filed with the trial court and denied as a delaying tactic (Pet. Mem. at 4), and that the document was never filed with the trial court and never considered due an error by his trial counsel (id. at 7-8).[8]

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[8] Petitioner contends in his Objections to the R&R, for the first time in this action, that he filed the declaration with the trial court eight weeks before trial. (Obj. at 56.) However, unlike the pleadings containing his allegations that the declaration was never filed and that it was sent to counsel on the eve of trial, the Objections are not signed under penalty of pe jury. There is also no indication in the record that these new allegations were ever presented to the state courts in support of this claim. Rather, the record is clear that Petitioner set forth the same conflicting allegations to the state courts with respect to the filing of his declaration as he has in the Petition Memorandum here.

The document Petitioner contends he did/didn't file appears to be part of the clerk's record in the superior court, but there is no reliable indication when it was submitted to that court or in what context, and no explanation why it was not file-stamped. (Affidavit of William D. Holman [Docket No. 10] Ex. D at D12.) It is clear that Petitioner waited until the day of trial to indicate to his counsel he wanted to represent himself. The record is also clear that, assuming the request was communicated to the trial court, it was made on the day of trial and was denied because it was found to be a delay tactic and because Petitioner was adequately represented.

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held that the structure of the Sixth Amendment impliedly grants to the accused personally the right to make his defense, and that the Sixth Amendment therefore necessarily implies a right to self-representation. Id. at 819-21. A state violates a criminal defendant's constitutional right to self-representation when it forces him to accept a state-appointed attorney after he knowingly and intelligently waives his Sixth Amendment right to counsel and clearly and unequivocally declares a desire to represent himself. Id. at 835-36.

The timeliness of a Faretta motion is a matter of federal and not state law. Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985). In regard to the "clearly established" law as to the

timeliness of a Faretta motion, the Ninth Circuit has observed that:

> "The only Supreme Court decision to discuss the timeliness of a request to proceed pro se is the Faretta decision itself. Our first in inquiry is thus whether Faretta 'clearly established' a rule of law regarding the timeliness of a request. In Faretta, the Court twice described the timing of Faretta's request to represent himself: it was made 'weeks before trial,' 422 U.S. at 835, 95 S.Ct. at 2542, and 'well before the date of trial,' id. at 802, 95 S.Ct. at 2527. The Court's acknowledgment of the timing of Faretta's request was neither a recitation of the background facts of the case nor obiter dictum; instead, it is mentioned not only in the opening paragraphs, but also in the very breath with which the Court announced its decision. Id. at 835, 95 S.Ct. at 2541. It is properly considered necessary to the Court's decision, and therefore is a holding of the Court. Export Group v. Reef Industries. Inc., 54 F.3d 1466, 1472 (9th Cir. 1995). As such, it is 'clearly established Federal law, as determined by the Supreme Court of the United States.'"

Moore v. Calderon, 108 F.3d 261,265 (9th Cir. 1997), abrogated on other grounds by Williams v. Taylor, 529 U.S. 362 (2000). Because the defendant in Moore had made his request weeks before trial and it was undisputed that his waiver of the right to counsel was knowing and intelligent, facts nearly identical to Faretta, the Ninth Circuit found that the trial court's failure to grant the Faretta motion was contrary to clearly established federal law. Moore, 108 F.3d at 265. Additionally, the Ninth

Circuit has recognized that because making a Faretta motion involves waiving the Sixth Amendment's guarantee of the assistance of counsel, Faretta requires the request for self-representation to be unequivocal. Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989); see also Faretta, 422 U.S. at 835 (noting that the defendant had properly asserted his right to represent himself because he "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel.").

An independent review of the record reveals that Petitioner has failed to demonstrate that his request for self-representation was made sufficiently prior to trial so that the trial court's denial of the claim on the basis of untimeliness was contrary to, or an unreasonable application of, clearly established federal law. Additionally, because Petitioner has presented two versions of his story, both under penalty of perjury, one stating that his request was never filed and one indicating that it was, he has not demonstrated that he made an unequivocal request to the trial court to represent himself.

Accordingly, the state court's denial of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts, and habeas relief is denied as to Claim 2.

IV. Claim 3.

In Claim 3, Petitioner contends he received ineffective assistance of trial counsel with respect to nine separate incidents. (Pet. Mem. at 5-11.) The Magistrate Judge discussed six of the nine sub-parts of Claim 3 and one sub-part not raised by Petitioner here, and did not apply the provisions of § 2254(d) to the state court's adjudication of these claims. (R&R at 15-21.) The Court therefore reconsiders these claims de novo and will consider Claim 3 in the first instance.

Petitioner presented sub-parts 1-6 of Claim 3 to the state supreme court in a habeas petition filed June 2, 2000.[9] (Affidavit of William D. Holman [Docket No. 10] Ex A.) That petition was denied by an order filed on September 27,2000, which stated in full: "Petition for writ of habeas corpus is DENIED." (Id. Ex. B at B2.) No part of Claim 3 was presented on direct appeal. (Respondent's Motion to Dismiss [Docket No. 8] Ex. A at A48.) Sub-parts 1-6 of Claim 3 were presented to the state superior court in a habeas petition filed

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[9] There are actually 10 sub-parts to Claim 3 identified in the Pet. Mem. (See Pet. Mem. at 6-11.) The sub-parts number 1-7 in the Pet. Mem. have been re-numbered as sub-parts 1-6 in this Order because sub-parts 1 and 2 as numbered in the Pet. Mem. present essentially the same claim and are treated as such here. The remaining three sub-parts are numbered 8, 9 and 9 in the Pet. Mem. and are re-numbered 7-9 here.

March 23, 2000. (Id. Ex. F.) That petition was denied by an order filed March 30,2000, which stated:

> In this case Petitioner has failed to allege a sufficient factual basis to support his claims of ineffective assistance of coun[illegible] and has not affirmatively demonstrated prejudice as is required by *Lesdesma* [which in turn applies the prejudice test of Strickland]. Further, in several cases Petitioner has raised spurious issues which, regardless of the factual context, are irrelevant to the charges at issue here. Accordingly, the Petition is denied. (Id. at F50.)

With respect to sub-parts 1-6 of Claim 3, Petitioner is not entitled to habeas relief in this Court because, for the following reasons, he has failed to demonstrate that the state court's denial of these claims, on the basis that he had failed to demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (1984) (requiring a showing that counsel's errors were so serious they deprived Petitioner of a trial whose result is reliable), and/or because the claims were spurious, is contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state courts. With respect to sub-parts 7-9, there is no indication in the record these claims were ever presented to any state court. However, this Court is empowered to deny these claims notwithstanding a failure to present them to the state courts because they are without merit. See 28 U.S.C.A. § 2254(b)(2) (West Supp. 2003).

1. Failure to object to admission of evidence or file a motion to suppress.

Petitioner contends he received ineffective assistance of counsel when trial counsel failed to object to the introduction of, or file a motion to suppress, evidence f his arrest by Bradberry for theft of services. It was Petitioner's arrest by Bradberry on those charges which gave rise to Petitioner's complaint against Bradberry for use of excessive force, which in turn provided the basis for the instant conviction for knowingly filing a false complaint against a peace officer. The records of the theft of service proceedings were ordered sealed pursuant to Cal. Penal Code § 851.8(c) after Petitioner was found factually innocent of the charges. However, evidence that Petitioner was arrested was introduced at trial to show that Petitioner had not included allegations regarding excessive use of force during the arrest in a civil complaint against Bradberry for slander which allegedly occurred two days after the arrest. The trial court found this evidence was relevant due to the timing of the complaint. (Respondent's Motion to Dismiss [Docket No. 7] Ex. A at A64.)

Respondent correctly contends that although Cal. Penal Code § 851.8 provides for the sealing and destruction of arrest records upon a showing of factual innocence, there is no provision in that statute precluding the admission in subsequent proceedings of the facts surrounding the arrest. (Answer at 10.)

Because California Evidence Code § 351 provides that all relevant evidence is admissible except as otherwise prohibited by statute, Respondent contends the evidence was relevant and admissible, and that any objection to its admission or motion to suppress by Petitioner's counsel would have been frivolous.

Petitioner has failed to identify a basis for exclusion of the facts of his arrest in light of their admissibility and relevance, but merely indicates that their admission deprived him of his statutory right to "state that he was never arrested when questioned about said records." (Pet. Mem. at 7.) This is apparently in reference to § 851.8(f), which provides that once an arrestee has been found factually innocent, "[t]hereafter, the arrest shall be deemed not to have occurred and the person may answer accordingly any question relating to its occurrence." Cal. Penal Code § 851.8(f) (West Supp. 2003). The state court's adjudication of this claim is not objectively unreasonable because Petitioner has not identified a basis for the exclusion of this relevant and admissible evidence. He has therefore failed to satisfy the prejudice prong of Strickland based on counsel's failure to object to the admission of this evidence or file a motion to have it suppressed.

2. Failing to file Petitioner's request for self-representation.

Petitioner contends trial counsel rendered ineffective assistance for failing to file with the trial court Petitioner's

declaration setting forth his request for self-representation, which Petitioner contends was never filed. (Pet. Mem. at p. 7-8.) As discussed above with respect to Claim 2, Petitioner alleges, under penalty of perjury, that his declaration was filed and his request was denied by the trial court on the basis that it was a delay tactic and because he was adequately represented. (Id. at p. 4.)

For the reasons set forth above with respect to Claim 2, Petitioner was not denied his right to represent himself at trial because his request, whether filed or not, was untimely. Petitioner has not demonstrated prejudice based on allegations that trial counsel failed to file the request because Petitioner contends he presented the request to trial counsel on the eve of trial, and because he contends his request was actually filed and considered by the court. Thus, the state court's adjudication of this claim was not objectively unreasonable.

3. Failing to bring to the court's attention Petitioner's medication.

Petitioner contends he received ineffective assistance of trial counsel based on counsel's failure to bring to the court's attention the fact that Petitioner had been injured in an automobile accident "just weeks" prior to trial and was under the influence of prescription medication during the trial. (Pet. Mem. at p. 8.) Petitioner contends that he "believes he was unable to pursue said trial." (Id.)

In presenting this claim to the state supreme court, Petitioner did not refer to any supporting facts or documents. (Affidavit of William D. Holman [Docket No. 10] Ex. A at A8.) In presenting a claim to the state superior court regarding the effectiveness of appellate counsel, Petitioner referred to a declaration filed by him on April 8, 1999. (See Respondent's Motion to Dismiss [Docket No. 7] Ex. F at F35-38.) In this declaration Petitioner indicates that during the trial he was taking prescription narcotics and cough syrup which, "made me very drowsy and unaware of the proceedings. Throughout the trial, as evidence[d] through listening to my testimony, I was constantly coughing and at times slow to respond to questions asked due to being under the influence of said narcotics." (Id.)

In order for Petitioner to demonstrate the was not competent to stand trial, he must show that he did not have sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, and did not have either a rational or factual understanding of the proceedings against him. Godinez v. Moran, 509 U.S. 389, 396-402 (1993). Petitioner has not shown that trial counsel should have been aware, based on Petitioner's symptoms, that this standard was satisfied. Petitioner has also failed to set forth any evidence, in this or any other court, that he was not competent to stand trial. See Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985) ("In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on

the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court."); Cuffle v. Goldsmith, 906 F.2d 385, 392 (9th Cir. 1990) (A "good faith" or "substantial doubt" exists "when there is substantial evidence of incompetence.").

Petitioner has failed to satisfy the performance prong of Strickland because he has not shown that a reasonably competent attorney would have questioned whether Petitioner was competent to stand trial. Petitioner has also failed to satisfy the prejudice prong of Strickland because he has not presented sufficient facts to create a real and substantial doubt as to his competency to stand trial, and has not shown a reasonable probability that the failure of counsel to bring a motion on that basis rendered his trial unfair. Indeed, Petitioner was able to make the decision to seek to represent himself, something he could not do if he were incompetent. Thus, the state court's adjudication of this claim was not objectively unreasonable.

4. Failure to present a vindictive/malicious prosecution defense.

Petitioner contends trial counsel was ineffective for failing to investigate and present a defense based on vindictive or malicious prosecution. (Pet. Mem. at p. 8-9.) Petitioner points to evidence which he contends suggests malicious prosecution, including the fact that Petitioner was charged with violation of

§ 148.6 two weeks before he filed a complaint with the San Diego grand jury regarding narcotics enforcement practices by the San Diego Police Department Narcotics Section and former Deputy District Attorney Peter Loganbach, and six months after the El Cajon Police Department completed its investigation into the complaint he made against Bradberry. (Id.) Petitioner also contends that Loganbach testified at the first trial that he had contacted Petitioner, and although the content of that conversation was disputed (Petitioner apparently contends Loganbach made malicious statements to Petitioner regarding why the charges were filed), it was against the state bar ethics code for an attorney to contact a represented defendant. (Id.)

Respondent contends that vindictive prosecution only occurs when a prosecutor takes action to punish a person for exercising some protected right provided by law. (Answer at 7-8.) Because Petitioner has identified no such protected right which he exercised (as filing knowingly false allegations of misconduct is not a protected right) and which resulted in any action taken by the prosecutor against Petitioner, Respondent contends there was no basis for trial counsel to investigate or present a malicious prosecution defense. (Id.) Respondent also contends that former Deputy District Attorney Peter Longanbach made no appearances in the matter, and was not assigned to the branch office where the case was issued and tried. (Id. at 9.)

Petitioner has set forth no facts which, if true, would support his contention that his prosecution was based on prosecutorial vindictiveness. As set forth above with respect to Claim 1, there is no protected Constitutional right to knowingly file a false allegation of misconduct against a peace officer, and there was sufficient evidence adduced at trial to support Petitioner's conviction for that offense. Accordingly, Petitioner has failed to demonstrate prejudice under Strickland, and the state court's adjudication of this claim was not objectively unreasonable.

5. Failure to object to manner of service of the summons.

Petitioner contends trial counsel was ineffective for failing to object to, or file a motion to dismiss based on, the manner of service used to notify Petitioner of the criminal charges against him. (Pet. Mem. at p. 9.) Petitioner contends he was "served" with the criminal complaint when it was placed in the front door of his mother's residence, and that "the rules governing proper notice to the Petitioner [were] not met." (Id.)

Respondent contends that California law provides that if a defendant is served with a summons and fails to appear, a bench warrant may then be ordered. Because Petitioner appeared as directed in the summons, there was no issue regarding service. Here, Petitioner has not demonstrated how he was prejudiced by trial counsel's failure to raise an objection to the manner of service of the summons. See Cal. Penal Code

§ 813 (providing for issuance of a warrant for the arrest of the defendant except that, upon the request of the prosecutor, a summons instead of an arrest warrant shall be issued); People v. Valenti, 49 Cal.2d 199, 204 (1957) (after arrest is made, the legality of the arrest has no bearing on the validity of the prosecution of the accused), disapproved on another point in People v. Sidener, 58 Cal.2d 645, 647 (1962). Thus, the state court's adjudication of this claim was not objectively unreasonable.

6. Failing to present testimony of Petitioner's mother.

Petitioner contends trial counsel was ineffective for refusing to call Petitioner's mother to testify at trial that it was her, and not Petitioner, who was responsible for mailing Petitioner's complaint against Bradberry to the police department. (Pet. Mem. at p. 9-10.) Petitioner contends that the "delivery" element of Cal. Penal Code § 148.6(a) was therefore not met and, but for counsel's failure, he could have succeeded in having the charge dismissed. (Id.)

Respondent contends the record indicates that Petitioner identified the complaint letter during his testimony at trial, which was entered into evidence as an exhibit, and that Petitioner stated under oath that "he sent" the letter himself and had signed it under penalty of perjury. (See Answer [Docket No. 18] Ex. B at B41-42.) Thus, Petitioner's contention that his mother would have testified that she "was responsible for

mailing" the complaint would not have established that Petitioner did not sign the complaint under penalty of perjury and cause it to be delivered. Petitioner contends in his Objections that his mother "may have" mailed the complaint by mistake. (Obj. at 63-64.) Even if Petitioner's mother could have established that she was responsible for mailing the letter without Petitioner's permission or knowledge, such testimony would have conflicted with Petitioner's trial testimony where he admitted he sent in the complaint.

Accordingly, habeas relief is denied with respect to sub-parts 1-6 because the state court's denial of these claims on the basis that Petitioner failed to demonstrate prejudice under Strickland and/or because they are spurious, was neither contrary to, nor involved an unreasonable application of, Strickland, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

7. Failure to properly file discovery motion.

Petitioner contends trial counsel rendered ineffective assistance by failing to properly file a motion for discovery of Bradberry's personnel file. (Pet. Mem. at p. 10.) Petitioner contends that "trial counsel failed to attach a duplicate of the police report [to the discovery motion] as required. Thus, assuming arguendo, that this is one of the consideration [sic] the

Court took into consideration when it denied said motion [sic] would be another issue of incompetence." (Id.)

This claim does not appear to have been presented to any state court in the form of an ineffective assistance of trial counsel claim, although the record does indicate that Petitioner's writ of mandate seeking to overrule the trial court's denial of a motion brought pursuant to Pitchess v. Superior Court, 11 Cal.3d 531 (1974)[10] was denied. (Respondent's Motion to Dismiss [Docket No. 7] Ex. C at C44-45.) Petitioner supplemented his habeas petition filed in the state supreme court with a letter in which he "emphasized the fact that the Pitchess motion was denied," and that trial counsel failed to conform with the statutory requirement that a copy of the police report be attached to the motion and "adds to the ineffective assistance of counsel claim." (Petitioner's Notice of Lodgment [Docket No. 37] at 48-49.) Whether this claim has been properly presented to the state supreme court or whether this

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[10] See City of Los Angeles v. Superior Court, 96 Cal.App.4th 255, 259-260 (2002)("'In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as *"Pitchess* motions" . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. The Penal Code provisions define "personnel records" (Pen.Code, § 832.8) and provide that such records are "confidential" and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code, § 832.7.) Evidence Code sections 1043 and 1045 set out the procedures for discovery in detail.")

Court addresses the merits notwithstanding a failure to present it to the state courts under 28 U.S.C. § 2254(b)(2), it is clear that Petitioner is not entitled to habeas relief.

Petitioner's counsel filed a motion for discovery seeking any complaints filed against the police officers involved in the case. (Respondent's Motion to Dismiss [Docket No. 7] Ex. C at C1-12.) One of the many grounds for opposing the motion was a failure to attach a copy of the police report in violation of California Evidence Code § 1046. (Id. at C15.) The record does not indicate the disposition of that motion, other than the reference to it being denied in the writ of mandate and the fact that the trial court ruled evidence that Bradberry was being investigated in a wrongful death shooting was inadmissible under Cal. Evidence Code § 352. (Answer [Docket No. 18] Ex. B at B29.) Petitioner contended in the supplement to his state habeas petition that the Pitchess motion was denied on the basis that the trial court took the position that since Bradberry was the victim Petitioner had no right to the records. (Petitioner's Notice of Lodgment [Docket No. 37] at 48.)

Petitioner has failed to sufficiently allege that his trial counsel's performance fell below an objectively reasonable level of competence in relation to the filing of the motion for discovery of Bradberry's personnel file. There is no indication in the record that the discovery motion was denied because of the failure to attach a copy of the police report to the motion,

which Petitioner admits is pure speculation in any case. Rather, it appears evidence of Bradberry's disciplinary record was considered and ruled inadmissible by the trial judge based on the Evidence Code. Petitioner has also failed to demonstrate prejudice by failing to set forth anything other than speculation that the motion would have been granted had the police report been attached. Accordingly, Petitioner is not entitled to habeas relief.

8. Failure to challenge the constitutionality of § 148.6(a).

Petitioner contends trial counsel rendered ineffective assistance by failing to pursue a motion to dismiss the charges on the basis that the statute was unconstitutional. (Pet. Mem. at p. 10-11.) Petitioner contends the fact that other litigants have succeeded in attacking the constitutionality of § 148.6(a) is proof of counsel's deficient performance and prejudice. (Id.)

The only mention of this claim in Petitioner's filings with the state supreme court is in the supplement to the habeas petition filed in that court. (Petitioner's Notice of Lodgment [Docket No. 37] at 48.) Petitioner indicated that, in the context of his claim that trial counsel was ineffective for failing to challenge the denial of the Pitchess motion on direct appeal, "this does not negate the fact that trial counsel failed to raise the issue of the statute[']s constitutionality as have appellants prevailed [sic] several cases against Penal Code § 148.6 and its

civil counterpart Civil Code § 47 that adds to counsel's ineffectiveness." (Id.)

The Magistrate Judge found that Petitioner had not satisfied the performance prong of Strickland because § 148.6 was newly enacted at the time of trial and counsel may have reasoned that the likelihood of success of such a challenge was questionable and decided as a matter of trial strategy to pursue more promising defenses. (R&R at 20.) The Court does not adopt this finding. The record is not sufficiently developed to determine what reason, if any, trial counsel had for not challenging the constitutionality of the statute, and this is not the type of decision the Court will assume was made based on trial strategy. At the time of the trial, the Supreme Court had decided R.A.V. and had made clear that statutes such as § 148.6(a) were unconstitutional unless they fell within one of three categories or survived strict scrutiny. As set forth above, it is subject to debate whether § 148.6(a) passes the R.A.V. tests. The Court need not determine whether counsel's performance in this regard was objectively unreasonable, however, because Petitioner has failed to demonstrate prejudice. Strickland, 466 U.S. at 697 (petitioner must demonstrate both deficient performance and prejudice).

The Magistrate Judge found that Petitioner had not satisfied the prejudice prong of Strickland because, in light of Stanistreet, it is certain that the defense would have made no

difference in the state court. In order to demonstrate prejudice from trial counsel's failure to challenge the constitutionality of § 148.6(a), Petitioner must show a reasonable probability that the failure to challenge the constitutionality of § 148.6(a) adversely affected the fairness of his trial. Strickland, 466 U.S. at 687. Although there is a hypothetical chance that the charge would have been dismissed based on such a challenge, Petitioner has not shown a reasonable probability it would have been. Rather, as set forth above, there is an objectively reasonable basis to find § 148.6(a) to be constitutional. Additionally, even had trial counsel succeeded on challenging the statute at the trial level, there is no guarantee that holding would have been upheld on appeal and the charge not reinstated. Because Petitioner has failed to satisfy the Strickland prejudice requirement based on trial counsel's failure to challenge the constitutionality of § 148.6(a) by showing his trial was rendered fundamentally unfair as a result of that failure, he is not entitled to habeas relief.

9. Failure to request appointment of a statistician.

Finally, Petitioner contends trial counsel rendered ineffective assistance by failing to request the court to appoint, as an expert witness, a statistician who "could have demonstrated selective prosecution of Petitioner" and "could have reviewed filings by the prosecution pertaining to the instant offense and determined (1) the circumstances under

which the false complaint was made; and (2) the time it took to file the case." (Pet. Mem. at p. 11.) It does not appear that this claim was presented to any state court.

This claim appears to be related to Petitioner's claim discussed above based on trial counsel's failure to investigate or present a defense based on vindictive prosecution. Petitioner has failed to demonstrate prejudice based on the failure to request appointment of a statistician for the same reasons set forth above finding that he failed to demonstrate prejudice for failure to present or investigate a vindictive prosecution defense. Habeas relief is denied as to this claim as Petitioner has failed to allege facts which, if true, would demonstrate deficient performance or prejudice.

V. Claim 4.

Petitioner contends in Claim 4 that he was denied his Fourteenth Amendment right to the effective assistance of counsel on appeal when counsel failed to: (1) obtain the entire record including trial transcripts and minute orders; (2) withdraw from representation when requested to by Petitioner; and (3) raise eleven issues of potential merit. (Pet. Mem. at 11-15.) The Magistrate Judge addressed the first two issues raised, and one of the eleven sub-parts of the third issue, but did not apply the provisions of § 2254(d) to the state court's adjudication of these claims. (R&R at 22-23.) The Court therefore reviews these claims de novo.

Petitioner presented Claim 4 to the California Supreme Court in a habeas petition filed June 2, 2000. (Affidavit of William D. Holman [Docket No, 10] Ex. A at A10-12.) That petition was denied by an order filed on September 27, 2000, which stated in full: "Petition for writ of habeas corpus is DENIED." (Id. Ex. B at B2.) This claim was also presented to the state superior court in a habeas petition filed March 23, 2000. (Respondent's Motion to Dismis: [Docket No. 8] Ex. F at F9-11.) That petition was denied by an order filed March 30, 2000, which stated:

> In this case Petitioner has failed to allege a sufficient factual basis to support his claims of ineffective assistance of counsel, and has not affirmatively demonstrated prejudice as is required by *Lesdesma* [which in turn applies the prejudice test of Strickland]. Further, in several cases Petitioner has raised spurious issues which, regardless of the factual context, are irrelevant to the charges at issue here. Accordingly, the Petition is denied. (Id. at F50.)

The Court will "look through" the state supreme court's silent denial and subject the opinion of the superior court to the provisions of § 2254(d).

1. Failure to obtain record.

Petitioner contends he received ineffective assistance of appellate counsel due to counsel's failure to have any of the trial or pre-trial proceedings transcribed. (Pet. Mem. at 12.) Petitioner contends appellate counsel simply could not file an

adequate appellate brief without the transcripts, although audiotapes of the proceedings were available, which resulted in the filing of an appellate brief which did not contain a single statutory or judicial citation. (Id.) A copy of the appellate brief is attached to the Answer as Exhibit E.

Respondent contends that appellate counsel's performance was adequate in that he raised two issues which were identified as grounds for appeal in the Engrossed Settled Statement on Appeal, which included Petitioner's failure to sign the advisory as required by § 148.6(a), and the introduction of records of Petitioner's prior criminal proceedings which had been sealed pursuant to Cal. Penal Code § 851.8. The fact that no judicial decisions were cited in the appellate brief is, according to Respondent, a function of the fact that the statutory scheme at issue had been amended in 1996, and that Petitioner has identified no pertinent cases addressing the amended version of the statute which had been decided at the time the brief was filed.

Petitioner has not demonstrated, either here or in the state court, that the failure of his appellate counsel to order transcripts of the trial and pre-trial proceedings had any effect on counsel's representation, particularly in light of the fact that audio recordings of those proceedings were available. Petitioner does not contend that counsel failed to review the audio recordings of the proceedings, merely that counsel "did

not admit" that he listened to the recordings. (Pet. Mem. at 12.) The record contains a trial court minute order granting Petitioner's request for waiver of fees for copies of the audio recordings. (Respondent's Response to Evidentiary Hearing [Docket No. 86] Ex. 1 at 2.)

Petitioner has failed to identify what citations should have been included in the appellate brief, or why, for the issued raised, reliance on the statutory language itself, which apparently had not yet been addressed in any published cases, was not sufficient to adequately present the claims on appeal. Nor has Petitioner shown how such citations would have changed the result. Thus, the state court's denial of this claim on the basis that Petitioner failed to demonstrate prejudice under Strickland and/or because it was spurious, was neither contrary to, nor involved an unreasonable application of, Strickland, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

2. Failure to withdraw from representation.

Petitioner contends he received ineffective assistance of appellate counsel based on counsel's failure to withdraw from representation when requested to by Petitioner. (Pet. Mem. at 13.) Petitioner contends that after counsel refused petitioner's request to file a habeas petition contemporaneously with the appeal, Petitioner sent a letter to counsel and to the court

directing counsel to withdraw from representation. (Id.) Petitioner contends that when counsel read the letter, he immediately "filed a brief" and did not cease representation, and Petitioner himself filed a habeas petition seeking to have counsel removed. (Id.) Petitioner filed a habeas petition on September 9, 1999, seeking to have his appellate counsel removed on the basis that counsel had failed to vigorously pursue the appeal. (Respondent's Motion to Dismiss [Docket No. 7] Ex. E at E4-13.) The petition was denied on December 6, 1999, as moot because the appeal was no longer pending. (Id. at E1-2.)

Respondent contends, and the Magistrate Judge agreed, that this claim was without merit because Petitioner had no right to self-representation on appeal, and therefore no constitutional right to insist that appellate counsel withdraw. (R&R at 22.) The Court sustains Petitioner's objection to this finding. Petitioner acknowledges that he has no Constitutional right to self-representation on appeal, but correctly contends that such a consideration is not dispositive in determining whether counsel's refusal to withdraw amounted to deficient performance or if Petitioner was prejudiced by that alleged deficiency. (Obj. at 68.)

However, Petitioner has failed to demonstrate that he was prejudiced by counsel's failure to withdraw from representation. Although Petitioner identifies eleven claims (set forth

immediately below) which he contends counsel should have raised on direct appeal, Petitioner has not demonstrated that he requested counsel to raise those claims on appeal. Petitioner filed a habeas petition in the superior court contending that appellate counsel should be required to withdraw because he had not raised claims regarding trial counsel's failure to call Petitioner's mother to testify that she mailed the complaint to the police and regarding trial counsel's failure to file Petitioner's request for self-representation with the trial court. (Respondent's Motion to Dismiss [Docket No. 7] Ex. E at E11.) As set forth above, these claims are without merit. In any case, Petitioner succeeded in presenting these claims in a habeas petition to the state supreme court which denied them on their merits. (Affidavit of William D. Holman [Docket No. 10] Ex. A at A9, Ex. B at B2.) Moreover, immediately upon receiving Petitioner's request that he withdraw, appellate counsel wrote a letter to the Superior Court acknowledging Petitioner's request and requesting guidance on how to proceed. (Attachment to Objections at p. 8.) Accordingly, the state court's denial of this claim on the basis that Petitioner failed to demonstrate prejudice under Strickland and/or because it was spurious, was neither contrary to, nor involved an unreasonable application of, Strickland, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

3. Failure to raise issues of potential merit.

Petitioner contends appellate counsel failed to: (a) present a claim challenging the constitutionality of § 148.6(a); (b) present a claim alleging ineffective assistance of trial counsel based on the claims presented in Claim 3 above; (c) challenge the denial of the Pitchess motion; (d) present a claim contending there was insufficient evidence to sustain the conviction; (e) present a claim regarding jury instructions which were requested and refused; (f) file a writ of habeas corpus presenting issues which are appropriately contained in such a petition; (g) include citation to case law in the appellate brief; (h) challenge the trial court's ruling refusing to allow an expert witness to testify as to the use of force; (i) appeal the trial court's denial of a motion to dismiss based on the prosecution's failure to present a prima facie case; (j) address the fact that Petitioner did not deliver the complaint to the police; and (k) address the issue regarding the admission of the sealed arrest records. (Pet. Mem. at 14-15.) The R&R addressed only the first sub-part of this claim. (R&R at 23.)

For the following reasons, the Court finds that the state court's denial of these claims on the basis Petitioner failed to demonstrate prejudice under Strickland and/or because they were spurious, was neither contrary to, nor involved an unreasonable application of clearly established federal law, and

was not based on an unreasonable determination of the facts in light of the evidence presented to the state courts.

a) Failure to challenge constitutionality of § 148.6(a).

Petitioner contends appellate counsel was ineffective for failing to present a challenge on appeal to the constitutionality of § 148.6(a). The Magistrate Judge found that the appellate brief was filed before any court decisions addressing the constitutionality of § 148.6(a) were published, and that because counsel may have reasoned that the likelihood of a successful challenge was questionable at best, Petitioner had not shown deficient performance. (R&R at 23.) The Court does not adopt this finding. The record is not sufficiently developed to determine what reason, if any, appellate counsel had for not challenging the constitutionality of the statute, and this is not the type of decision the Court will assume was made based on strategy. The Court need not determine whether counsel's performance in this regard was objectively unreasonable, however, because the state court's finding that he had not shown prejudice was objectively reasonable for the same reasons set forth above regarding his failure to demonstrate prejudice as a result of trial counsel's failure to present this claim.

b) Failure to present claim of ineffective assistance of trial counsel.

Petitioner contends appellate counsel was ineffective for failing to present a claim on appeal alleging ineffective assistance of trial counsel as set forth above in Claim 3. Under California law, claims of ineffective assistance of trial counsel are properly brought on collateral review, not on direct appeal, when, as here, the record on appeal does not affirmatively demonstrate the reason for trial counsel's actions. People v. Wilson, 3 Cal.4th 926, 936 (1992). Petitioner contends below in sub-part (f) that appellate counsel should have filed a habeas petition. The failure of appellate counsel to present a claim alleging ineffective assistance of trial counsel on direct appeal was neither deficient performance nor prejudicial to Petitioner.

c) Failure to challenge ruling on discovery motion.

Petitioner contends appellate counsel was ineffective for failing to present a claim on appeal addressing the issue of the denial of the discovery motion requesting the detective's personnel file. Petitioner identifies no basis for challenging the denial of the discovery motion. For the same reasons set forth above rejecting the claim that trial counsel rendered ineffective assistance by failing to challenge the denial of the discovery motion, this claim is without merit.

d) Failure to present a claim challenging the sufficiency of the evidence.

Petitioner contends appellate counsel was ineffective for failing to present a claim on appeal alleging that insufficient evidence was adduced to support his conviction. Petitioner does not identify with respect to this claim which elements of his offense were not proven, but contends in Claims 5 and 9 below that specific elements of the offense were not proven. To the extent Petitioner contends there was no evidence that he read or signed the statutorily-required admonishment, Petitioner has failed to demonstrate deficient performance or prejudice because the claim is without merit for the reasons set forth below with respect to Claim 5. To the extent he claims insufficient evidence existed to demonstrate Bradberry was acting within the scope of his official duties, Petitioner has failed to demonstrate deficient performance or prejudice because the claim is without merit for the reasons set forth below with respect to Claim 9.

e) Failure to address jury instructions.

Petitioner contends appellate counsel was ineffective for failing to "[a]ddress the jury instructions that counsel failed to object to and that the Court denied being read to the jury." (Pet. Mem. at 14.) Petitioner does not identify which instructions he contends were not given which should have been, or which instructions were given which should not have been given.

Thus, Petitioner has failed to demonstrate prejudice as to this claim. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (conclusory allegations that are not supported by specific facts do not merit habeas relief).

f) Failure to file a writ of habeas corpus.

Petitioner contends appellate counsel was ineffective for failing to file a petition for a writ of habeas corpus "to address issues that may be served with such a writ." (Pet. Mem. at 14.) Petitioner has not demonstrated prejudice because he does not identify what claims should have been presented in that petition. James, 24 F.3d at 26.

g) Failure to include citations in appellate brief.

Petitioner contends appellate counsel was ineffective for failing to cite cases or statutes in the appellate brief. This claim repeats a claim presented above with respect to Petitioner's claim that appellate counsel rendered ineffective assistance in failing to order transcripts of the trial and pre-trial proceedings. Petitioner has failed to demonstrate prejudice because this claim is without merit for the reasons set forth above.

h) Failure to challenge exclusion of expert witness.

Petitioner contends appellate counsel was ineffective for failing to present a claim on direct appeal addressing the issue regarding the trial court's refusal to allow Petitioner to present an expert witness to testify regarding the use of force. Petitioner does not specify what the expert witness' testimony would be

and has therefore failed to demonstrate prejudice. James, 24 F.3d at 26.

i) Failure to file a motion to dismiss.

Petitioner contends appellate counsel was ineffective for failing to present a claim on direct appeal addressing the trial court's denial of a motion to dismiss based on the prosecution's failure to present a prima facie case pursuant to Cal. Penal Code § 1118.1 (providing for entry of judgment of acquittal upon showing of insufficient evidence). As set forth throughout this Order, Petitioner has not demonstrated a lack of sufficient evidence with respect to any element of the offense so as to demonstrate that a motion for judgment of acquittal would be meritorious.

j) Failure to challenge delivery of complaint.

Petitioner contends appellate counsel was ineffective for failing to present a claim on direct appeal addressing the fact that Petitioner did not deliver the complaint to the police department. Petitioner has failed to demonstrate deficient performance or prejudice for the reasons discussed above rejecting Petitioner's claim that trial counsel rendered ineffective assistance of counsel for failing to call Petitioner's mother as awitness to testify that she mailed the complaint to the police. The record supports a finding that Petitioner admitted on the stand at trial that he sent in the complaint and that he had signed it under penalty of perjury.

k) Failure to bring claim based on admission of sealed evidence.

Petitioner contends appellate counsel was ineffective for failing to present a claim on direct appeal addressing the admission of the evidence of the arrest which had been ordered sealed pursuant to Cal. Penal Code § 851.8(c). Petitioner has demonstrated neither deficient performance nor prejudice for the reasons set forth above with respect to Petitioner's claim that trial counsel was deficient in failing to object to the admission of this evidence or file a motion to suppress.

VI. Claim 5

Petitioner contends in Claim 5 that the prosecution failed to produce evidence that Petitioner read or signed the admonishment set forth in Cal. Penal Code § 148.6(a), thereby failing to demonstrate a requisite element of the offense. (Pet. Mem. at 15.) Petitioner presented this claim on direct appeal from the municipal court to the superior court, contending that Cal. Penal Code § 148.6(a)(2) requires, as an element of the offense, that the complainant read and sign an advisory. Section 148.6(a)(2) states that: Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory:

> You have the right to make a complaint against a police officer for any improper police conduct. California law requires this agency to have a

> procedure to investigate citizens' complaints. You have a right to a written description of this procedure. This agency may find after investigation that there is not enough evidence to warrant action on your complaint; even if that is the case, you have the right to make the complaint and have it investigated if you believe an officer behaved improperly. Citizen complaints and any reports or findings relating to complaints must be retained by this agency for at least five years. Its against the law to make a complaint that you know to be false.

The superior court affirmed the conviction in an order which stated in full: "The judgment of the trial court is unanimously affirmed." (Respondent's Motion to Dismiss [Docket No. 7] Ex. A at A9.) Petitioner did not seek further appellate review. Rather, Petitioner presented the claim to the state supreme court in a habeas petition filed on September 10,2001, by way of a supplement to the petition in the form of a letter dated February 11, 2002. (Respondent's Response to Order for Further Lodgments [Docket No. 40] Ex. A at A2-11.) The claim, as presented to the state supreme court, read:

> Additionally, there was no evidence presented by the prosecution during either of the two trials that I had ever read the admonishment. Hence, it is my position that at no time did I ever read the admonishment of the statute, inasmuch the inescapable fact that the admonishment the police required to sign was never presented since it never existed since, I never read the admonishment. (Id. at A3.)

That petition was denied by an Order filed February 27, 2002, which stated in full:

> Petition for writ of habeas corpus is DENIED. (See *In re Clark* (1993) 5 Cal.4th 750; *In re Swain* (1949) 34 Cal.2d 300, 304; *In re Dixon* (1953) 41 Cal.2d 756, *In re Lessard* (1965) 62 Cal.2d 497, 503, *In re Duvall* (1995) 9 Cal.4th, 474, and *In re Lindley* (1947) 29 Cal.2d 709.)

(Id. at A1.) This Court must perform an "independent review of the record" to ascertain whether the state supreme court decision was objectively unreasonable. Delgado, 223 F.3d at 982.

Respondent contends that, to the extent this presents a federal question at all, Petitioner has not carried his burden of proof under Jackson v. Virginia, 443 U.S. 307 (1979), which requires Petitioner to demonstrate that, when reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found proof beyond a reasonable doubt of every element of the offense. (Respondent's Motion to Dismiss [Docket No. 34] at 10.) Respondent contends that Petitioner has, at most, suggested a conflict in the evidence and contends his interpretation of the evidence is the more convincing. (Id.) The Magistrate Judge indicated that this claim should be treated as a sufficiency of the evidence claim. (R&R at 3.) The Magistrate Judge then found that this claim presents a question of state law only based on the reasoning of the California Supreme Court in Stanistreet, 58 P.3d at 470, that

the advisory merely advises the complainants of the law and impresses on them the significance of the formal complaint. (R&R at 23.) The passage referred to in Stanistreet does not discuss the advisory provision and the Court does not adopt this finding.

It is a fundamental principle that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Failure to require the jury to find every element of the offense beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 275, 279-81 (1993). Thus, if Petitioner can demonstrate that signing or reading the advisory is an element of the offense of violating § 148.6(a), and that the prosecution failed to prove that element beyond a reasonable doubt, he would have established a due process violation. Because this Court is required to liberally construe the Third Amended Petition, Corjasso v. Avers, 278 F.3d 874, 878 (9th Cir. 2002), the Court finds that Petitioner has presented, in this Court, a federal due process challenge based on the failure of the prosecution to prove what Petitioner contends to be an element of the offense.

However, Petitioner never presented the federal nature of this claim to the state courts. This Court may still reach the

merits of this claim, despite the failure to present it to the state's highest court, provided the entire application for habeas relief is denied. 28 U.S.C.A. § 2254(b)(2) (West Supp. 2003). Here, it is clear that reading and signing the advisory is not an element of the offense of knowingly presenting a false allegation of misconduct against a peace officer under Cal. Penal Code § 148.6(a). On July 22, 1999, a misdemeanor Complaint was filed charging: "On or about March 25, 1997, Darren Nero Chaker did unlawfully file an allegation of misconduct against a peace officer knowing the allegation to be false, in violation of Penal Code Section 148.6(a)(l)." (Respondent's Motion to Dismiss [Docket No. 8] Ex. A at A61 .) Reading and signing the advisory is not an element of this offense, rather it is a requirement placed on the police department to provide such an advisory, similar to the requirement that the advisory be made available in multiple languages. Accordingly, Petitioner has not demonstrated a due process violation by a failure to prove that he read or signed the advisory, and habeas relief is denied.

VII. Claim 9[11]

Petitioner contends in Claim 9 that his conviction is invalid because § 148.6(a) only applies to complaints of misconduct against a peace officer when the officer was

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[11] Petitioner has abandoned Claims 6-8 and 10-11 in the Third Amended Petition. (See Docket No. 46.)

engaged in official conduct. (Pet. Mem. at 18.) Petitioner contends Bradberry was not acting within the scope of his employment because: (1) the arrest was made without a warrant and was therefore presumptively illegal; (2) the court granted a motion pursuant to Cal. Penal Code § 851.8(c) which precluded a finding of probable cause for the arrest; and (3) the case was initially dismissed pursuant to Cal. Penal Code § 995 further dictating that the arrest was made without I probable cause. (Id.)

Respondent contends that, to the extent this presents a federal question at all, Petitioner has not carried his burden of proof under Jackson v. Virginia, 443 U.S. 307 (1979), which requires Petitioner to demonstrate that, when reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found proof beyond a reasonable doubt of every element of the offense. (Respondent's Motion to Dismiss [Docket No. 34] at 10.) The Magistrate Judge concluded that the determination whether Bradberry was acting within the scope of his official duties involves an interpretation of state law, which is a matter for state courts to determine and resolve, and therefore there is no basis for granting habeas relief in this Court because this claim raises primarily an issue of state law. (R&R at 24.)

Petitioner presented this claim to the state supreme court in a letter supplementing a habeas petition filed in that court. (Petitioner's Notice of Lodgment [Docket No. 37] at 48.)

Petitioner contended that: "The arrest was not in the performance of the detective's official duties. The law requires that the alleged misconduct occur during the course of the officer's official duties. (*San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19 at p. 23.) Here, the arrest the detective made was [invalid for the reasons set forth above]." (Petitioner's Notice of Lodgment [Docket No. 37] at 48.)

Petitioner did not present a federal basis for this claim to the state courts. However, even to the extent that, under a liberal construction of the Third Amended Petition, Petitioner is presenting a federal due process challenge contending that the prosecution failed to prove an element of the offense beyond a reasonable doubt, he is not entitled to habeas relief. The evidence at trial indicated that Officer Johnson and Detective Bradberry arrested Petitioner following an investigation based on charges which were lodged against Petitioner by an auto body shop for theft of services; Petitioner had allegedly given a false name and had retrieved his vehicle without paying for the work done. (Answer, Ex. B at B34.) Thus, there is no factual dispute that, at the time of the arrest, Bradberry was acting within the scope of his employment as a peace officer. See Mary M. v. City of Los Angeles, 54 Cal.3d 202, 218-19 (1991) (peace officer is acting within scope of employment when act was authorized by the employer and accomplished by using the

authority the officer had as a result of his employment). Accordingly, whether this claim has been properly presented to the state supreme court or whether this Court addresses the merits notwithstanding a failure to present it to the state courts under the authority of 28 U.S.C. § 2254(b)(2), an independent review of the record reveals that Petitioner is not entitled to habeas relief with respect to Claim 9.

VIII. Claim 11

Petitioner contends in Claim 11 that the writ should issue due to the admission of evidence which had been ordered sealed pursuant to Cal. Penal Code § 851.8. (Pet. Mem. at 20-21.) This claim was raided on direct appeal from the municipal court to the superior court, and was denied, but no further appeals were taken. (Respondent's Motion to Dismiss [Docket No. 7] Ex. A at A53-54.) Petitioner presented a similar claim to the state supreme court in a letter supplementing a habeas petition, stating: "Additionally, I believe trial counsel was ineffective for failing to suppress evidence, and appellate counsel failing to appeal, obtained and subsequently introduced that had been sealed per Penal Code § 851.8. There are no provisions that allow for records under such an order to be 'unsealed' even via search warrant." (Petitioner's Notice of Lodgment [Docket No. 37 at 49.) Because that habeas petition was denied without a statement of reasoning, the Court must conduct an

independent review of the record with respect to this claim. This claim was not addressed in the R&R.

As set forth above with respect to Claim 3 where Petitioner contended trial counsel was ineffective for failing to object to the introduction of this evidence and/or file a motion to suppress, Petitioner has failed to demonstrate any basis for his contention that evidence of his arrest was not relevant or admissible. Rather, the statute itself provides for admissibility of the sealed records themselves in civil suits initiated against the arresting officer. Moreover, state evidentiary rulings are not cognizable in a federal habeas proceeding unless the admission of the evidence violated petitioner's due process right to a fair trial. Estelle v. McGuire, 502 U.S. 62, 70 (1991). To establish a due process violation, Petitioner must show that the trial court's ruling was so prejudicial that it rendered his trial fundamentally unfair. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897 (9th Cir. 1996); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

Petitioner merely indicates that he was denied his statutory right to answer "no" when asked whether the arrest ever happened. However, Petitioner does not indicate how his ability to deny that an arrest took place would prevent him from being questioned regarding his facts surrounding his complaint of the use of excessive force in the course of his encounter with Bradberry. As set forth above with respect to Claim 3, Petitioner

has failed to demonstrate that the facts surrounding his arrest were not relevant or admissible. Accordingly, whether this claim has been properly presented to the state supreme court or whether this Court addresses the merits notwithstanding a failure to present it to the state courts under 28 U.S.C. § 2254(b)(2), an independent review of the record reveals that Petitioner is not entitled to habeas relief.

IX. Claim 12

Petitioner contends in Claim 12 that the writ should issue because his placement in custody violated the stale misdemeanor rule in violation of the Fourth Amendment. (Pet. Mem. at 21-22.) Respondent contends this claim does not present a federal question. (Respondent's Motion to Dismiss [Docket No. 34] at 12.) The Magistrate Judge concluded this claim does not present a basis for habeas relief because it raises an issue of state law only. (R&R at 24.)

The rule referred to by Petitioner is set forth in Cal. Penal Code § 836.2, and provides that a peace officer may not make a warrantless arrest for a misdemeanor which did not occur in the officers' presence. There is no federal constitutional requirement that a misdemeanor be committed in an officer's presence before a warrantless arrest is made. Barry v. Fowler, 902 F.2d 770, 772-73 (9th Cir. 1990) (holding that Cal. Penal Code § 836.1 was not grounded in the federal constitution). Accordingly, although the record indicates that this claim has

never been presented to the state supreme court, the Court finds that, notwithstanding a failure to present it to the state courts, Petitioner is not entitled to habeas relief.

X. Claim 13

Petitioner contends in Claim 13 that the writ should issue because the $1124 fine imposed was so excessive that it amounts cruel and unusual punishment. (Pet. Mem. at 22.) Specifically, he contends that he is indigent and cannot afford to pay the fine, and that if he does not pay the fine his ability to expunge the record upon completion of probation will be prejudiced as payment of the fine is a condition of probation. (Id.) Respondent contends that Petitioner did not present this claim to the state supreme court. (Respondent's Motion to Dismiss [Docket No. 34] at 8.) Respondent also contends that Petitioner has not demonstrated that his fine was grossly disproportionate to his crime so as to amount to a violation of the Eighth Amendment. (Id. at 13.)

Although Petitioner failed to present this claim to the state supreme court, this Court is empowered to deny the claim on its merits notwithstanding a failure to present it to the state courts, provided the application for habeas relief itself is denied. 28 U.S.C.A. § 2254(b)(2) (West Supp. 2003). The Magistrate Judge found that Petitioner's fine did not render his sentence grossly disproportionate to his crime when compared to the sentences in Harmelin v. Michigan, 501 U.S. 957 (1991) and

Rummel v. Estelle, 445 U.S. 263 (1980). (R&R at 25-26.) The Court agrees with and adopts the Magistrate Judge's findings and denies habeas relief with respect to this claim for the reasons set forth in the R&R.

XI. Conclusion

Based on the foregoing:

(1) Petitioner's Motion for Summary Judgment [Docket No. 45] is **DENIED**;

(2) Petitioner's Motion for an Evidentiary Hearing and for Leave to Conduct Discovery [Docket No. 77] is **DENIED;**

(3) The Application for a Writ of Habeas Corpus is **DENIED**; and,

(4) A Certificate of Appealability is **ISSUED** which is limited to Claim 1.

IT IS SO ORDERED.

DATED: September 23, 2003

/s/
HON. BARRY TED MOSKOWITZ
United States District Judge

CC: ALL PARTIES

(3)

No. 05-1118

IN THE

Supreme Court of the United States

ALAN CROGAN, CHIEF PROBATION OFFICER,

Petitioner,

v.

DARREN DAVID CHAKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

Joseph H. Fagan
Alexander M.R. Lyon
Brian D. Kaider
HELLER EHRMAN LLP
1717 Rhode Island Avenue, NW
Washington, DC 20036
(202) 912-2000

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Counsel for Respondent

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QUESTIONS PRESENTED

1. A California statute criminalizes knowingly false accusations of peace officer misconduct but permits knowingly false statements exonerating the accused peace officer. Was the Court of Appeals correct in concluding that the statute is viewpoint discriminatory in violation of the First Amendment?

2. The statute singles out for punishment only false accusations against peace officers but not false accusations against any other public officials or private individuals. Should the ruling below be upheld on the alternative ground that the statute constitutes impermissible content discrimination under the First Amendment?

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JURISDICTION

Respondent has no quarrel with the Petition's statement of the basis for jurisdiction but does dispute the identities of the Petitioners listed. Although the only defendant in the proceedings below was Petitioner Alan Crogan, the Petition, without formal motion, purports to add "the People of the State of California" as a party. For convenience, Petitioner will be referred to as "the State."

STATUTORY PROVISION

The State quoted only an excerpt of the statutory provision at issue, Cal. Penal Code § 148.6. This provision is quoted in full in the Statutory Addendum to this Opposition.

INTRODUCTION

This case has all the hallmarks of a *cert.* denial.

Applying established principles of viewpoint discrimination from recent Supreme Court precedent, the Court of Appeals unanimously concluded that a California statute, Cal. Penal Code § 148.6(a), is impermissibly viewpoint discriminatory. The statute imposes criminal penalties only on those who are deemed to have made false *accusations* of misconduct against peace officers, but the accused peace officer who falsely denies such charges, and a fellow officer or civilian crony who falsely exonerates him, can lie with impunity. The State does not assert that this Court's precedents are unclear or that this case raises important unanswered questions. The State just disagrees with the panel's application of standard viewpoint discrimination principles to this peculiar case.

Peculiar is the word. The State has scarcely ever enforced the statutory provision; its lawyers can recall only one other prosecution in the statute's 10-year life span. Only four other states have statutes featuring the same discriminatory penalty. And the State can fix the problem tomorrow—without sacrificing the right to prosecute purveyors of false accusations—simply by applying any criminal penalty to all false statements made in connection with investigations of police misconduct, without regard to whether they accuse or support the officer.

Precisely because this sort of provision is so uncommon, the lower courts have scarcely had a chance to assess its constitutionality. Thus, no circuit split has materialized; indeed, every other federal court to assess section 148.6 or a similar statutory provision—in four district court cases—has found it unconstitutional.

While the State correctly points out that the California Supreme Court has rejected a constitutional challenge to the statute, *see People v. Stanistreet,* 29 Cal. 4th 497 (2002), *cert. denied*, 538 U.S. 1020 (2003), it neglects to mention that the challenge there was different—a *content* discrimination challenge based upon the argument that California must criminalize all false complaints against all public officials if it wishes to penalize false complaints against peace officers. The California Supreme Court has yet to rule upon the claim of *viewpoint* discrimination the Court of Appeals addressed here.

Perhaps the California Supreme Court—and some of the state or federal courts that might consider challenges to the handful of other state statutes exhibiting a similar defect—will eventually disagree with the Court of Appeals's ruling on this First Amendment theory. If so, this Court will have ample opportunity to address the issue. But this Court

should not stretch to do so in this case, both because the issue has scarcely percolated in the lower courts and because this case is the wrong vehicle.

The issue comes wrapped in an awkward habeas corpus posture, which carries baggage that will present unwelcome distractions, at best, and prevent this Court from reaching the merits, at worst. First, there is no factual record on which to assess the State's proffered justifications for the differential penalty. Second, the State previously raised a veritable obstacle course of jurisdictional challenges, none of which is independently worthy of this Court's attention. Third, the Magistrate Judge, the District Court, and the Court of Appeals applied three different standards of review. Should this Court address only whether the arguments in defense of the statute are reasonable (as the Magistrate Judge did), or whether a challenge can be sustained purely on the basis of law that was clearly established (as the District Court did), its ruling will have no practical value beyond this case.

If this Court is eager to consider the constitutionality of this uncommon statutory scheme, it will shortly have a more suitable vehicle: Currently pending before the Ninth Circuit is an appeal of a ruling declaring the same statute unconstitutional in a civil lawsuit brought to challenge the statute directly.

It was presumably for these reasons that not a single judge in the Ninth Circuit found this case worthy of en banc review. This Court, too, should decline review.

STATEMENT[1]

Mr. Chaker Accuses a Police Officer of Misconduct

In 1996, Respondent Darren Chaker contracted with an auto body shop to repair his car. ER 22. The contract specified the repairs to be performed and estimated a $2,000 price tag. *Id.* In violation of California law, the body shop performed additional work without Mr. Chaker's approval and demanded $4,800, more than twice the estimate. *Id.; see* Cal. Bus. & Prof. Code § 9884.9. Mr. Chaker retrieved his car without paying for the additional work. ER 22.

The body shop contacted the El Cajon Police Department, and Detective Bill Bradberry and Officer Terry Johnston later arrested Mr. Chaker for theft of services. App. 5a. The trial court dismissed the case, finding Mr. Chaker factually innocent of the charge, because it was illegal for the body shop to perform the unauthorized work in the first place. ER 24; SER 34.

This appeal arises not out of that case but out of an accusation Mr. Chaker made against one of the arresting officers. While the theft-of-services charge was pending, Mr. Chaker wrote a letter to the El Cajon Police Department's Internal Affairs Department alleging that Det. Bradberry used excessive force during the arrest. App. 5a. The letter stated that Mr. Chaker peaceably submitted to the arrest but that "Det. Bradberry hit me on my ribs anyway"

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[1] The Petition for Writ of Certiorari is cited as "Pet.," and the Appendix to the Petition is cited as "App." The Excerpts of Record and the Supplemental Excerpts of Record before the Court of Appeals are cited as "ER" and "SER," respectively. The transcript of oral argument before the Court of Appeals is cited as "Tr."

and that "Det. Bradberry's use of force damaged my wrist, ribs." App. 5a n.1; *see* App. 44a.

Mr. Chaker signed the letter "under penalty of perjury." App. 5a. He did not, however, sign the formal advisory required under California law acknowledging that an accuser can be criminally prosecuted for filing a false accusation. *See* Cal. Penal Code § 148.6(b)(2).

Mr. Chaker is Convicted for Writing the Letter

A half-year later, and 16 months after the theft-of-services charge was dismissed, the San Diego District Attorney's office brought new criminal charges against Mr. Chaker for writing that one accusatory letter. App. 5a-6a. Investigators had concluded that the accusation was false, and the district attorney charged Mr. Chaker under a state statute making it a crime to "file any allegation of misconduct against any peace officer ... knowing the allegation to be false." Cal. Penal Code § 148.6(a)(1).

Predictably, the trial devolved into a swearing contest. While all agreed that Mr. Chaker "did not resist at all" when Det. Bradberry arrested him, App. 44a-45a, the two stories diverged from there. Mr. Chaker swore that Det. Bradberry had unnecessarily twisted his wrist, causing him extreme pain, and had roughly wrenched him out of the van when he was half way in, injuring his head and ribs. App. 45a. Mr. Chaker's mother and his lawyer for the theft-of-services case testified that Det. Bradberry flew into a rage and threatened Mr. Chaker when Mr. Chaker served him with a lawsuit in open court. ER 21-24. Det. Bradberry and his partner, for their part, denied the charges of excessive force. App. 6a, 44a-45a. Law enforcement also produced a civilian witness who testified that the arrest appeared routine and that, from her vantage point inside the store where Mr. Chaker was

arrested, she did not hear complaints of pain or raised voices coming from the van outside. App. 6a; ER 12. Det. Bradberry also denied issuing any threats. App. 45a.

Unable to resolve the conflicting testimony, the first jury deadlocked. App. 42a. On retrial, a second jury resolved the credibility questions in favor of the officers and convicted Mr. Chaker. *Id.* The court sentenced him to two days in jail, plus community service, three years' probation, and fines and restitution. App. 6a. The Appellate Division affirmed the conviction. App. 7a.

Mr. Chaker Seeks Habeas Relief

Mr. Chaker filed three successive habeas corpus petitions in state court. The third, filed in 2001 in the California Supreme Court, challenged the constitutionality of section 148.6, the statutory provision under which he was convicted. Mr. Chaker invoked a recent decision from a federal court in California holding that the statute violated the First Amendment. ER 46I; *see La France Hamilton v. City of San Bernardino,* 107 F. Supp. 2d 1239 (C.D. Cal. 2000); *see also La France Hamilton v. City of San Bernardino,* 325 F. Supp. 2d 1087, 1095 (C.D. Cal. 2004) (permanently enjoining enforcement of section 148.6). The state court denied the petition on procedural grounds. App. 7a. Mr. Chaker then amended a federal habeas corpus petition he had previously filed to include a constitutional challenge to the statute. *Id.*

The Magistrate Judge believed the statute "probably violates the First Amendment." App. 38a. But he recommended denial of the petition in light of the habeas corpus statute's direction that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits ... unless the adjudication of the claim ... resulted in a decision that ... *involved an unreasonable application of,*

clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d) & (d)(1) (emphasis added). The Magistrate Judge believed that habeas relief could not be granted on this claim because "reasonable jurists can obviously differ as to the constitutionality" of the statute. App. 38a.

The District Court, too, denied the claim. App. 7a, 27a-107a. The District Court rejected the Magistrate Judge's standard of review, adopting a different, but still deferential, standard: "[T]his Court is obligated to exercise its independent judgment regarding whether Petitioner's conviction violated the federal Constitution after carefully weighing all the reasons for a state court's judgment and determining whether that judgment was objectively unreasonable." App. 39a. But the District Court believed that habeas review of this case had to be limited only to arguments based upon "clearly established federal law," as opposed to arguments that might fill in gray areas or expand upon current doctrine. App. 46a, 57a, 60a, 61a. Through this deferential lens, the District Court declined to disturb the conviction. App. 60a-62a.

The Court of Appeals Finds the Statute Unconstitutional

The Court of Appeals unanimously reversed, directing the District Court to grant the writ. App. 26a. On its way to the merits, the Court of Appeals had to plod through a litany of new procedural grounds—including four purported jurisdictional arguments—that the State and its amici urged for affirming the dismissal. *See* App. 8a-12a; *see infra* at 26-27. Next, the Court of Appeals turned to the disagreement between the District Court and the Magistrate Judge as to the appropriate standard of review and concluded they were both wrong. The Court of Appeals adopted yet a third analysis, holding that de novo review was appropriate because "there

is no state court ruling on the merits of Chaker's First Amendment claim," and thus no opinion to which to defer. App. 12a.

Turning, finally, to the merits, the Court of Appeals held that section 148.6 violated the First Amendment. Reviewing this Court's decisions in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Virginia v. Black*, 538 U.S. 343 (2003), the Court of Appeals noted that certain speech, such as "fighting words" or libel, does not warrant constitutional protection but that regulation of such low-value speech still may not be based on the speaker's viewpoint. App. 17a-21a. The court then observed that section 148.6 criminalizes only accusations that law enforcement officials later conclude were false and not lies of peace officers who falsely deny the allegations or the lies of fellow officers or witnesses who falsely exonerate them. App. 22a-24a. The court thus concluded that the statute impermissibly regulates speech on the basis of a speaker's viewpoint. App. 24a.

The State petitioned for rehearing en banc. Its petition led with an argument that the court lacked jurisdiction to entertain this habeas case because it was moot. *See* Petition for Rehearing En Banc at 6-9. The State also made the same First Amendment arguments it advances in this Petition. *Id.* at 9-17. The Court of Appeals denied the petition, noting that not a single one of the circuit's 24 active judges considered the case worthy of en banc review. App. 1a.

REASONS TO DENY THE WRIT

The parties agree on all the foundational principles: First, abusive, corrupt, or wayward police officers degrade our justice system and undermine the public's faith in law enforcement. Second, in order to deter and punish police abuses, the government must set up some system by which

victims of such abuses can bring them to the attention of the authorities. Third, the government should have some latitude to protect the integrity of the mechanism by which complaints are lodged and investigated.

None of these foundational principles is at stake in this case. California's complaint system remains intact; citizens are as free as ever to report police abuses. The Court of Appeals did not question California's interest in "assuring the integrity" of that process, Pet. 6, and cast no doubt on California's latitude, if it chooses, to achieve that goal by punishing citizens who make accusations that the police later conclude are false.

All the Court of Appeals held was that if California wishes to take that step, the penalty must swing both ways. California may not, in the name of protecting integrity, adopt a discriminatory penalty that could send a citizen to jail for making an accusation that the police later deem false but give a free pass to the officer who falsely denies the charge against him or the brother officer or civilian who falsely exonerates him. But, as the Court of Appeals observed, the "impermissible viewpoint-based bias ... is easily cured." App. 26a.

The State asks this Court to intervene, seeking a ruling that the State is permitted to punish only the accuser and not the accused or his supporters. This Court should deny the writ for four reasons. First, the issue is not of profound importance, even to the State of California, much less to the rest of the nation. Second, there is no conflict among the circuits, or even with the California Supreme Court, and few courts have had the opportunity to wrestle with the questions presented. Third, the issue is not novel, and the Court of Appeals was correct. Fourth, this case is not, in any event, a suitable vehicle for resolving the questions presented.

I. THE VALIDITY OF A RARE AND LITTLE-USED STATE LAW IS NOT A QUESTION OF PROFOUND NATIONAL IMPORTANCE, ESPECIALLY SINCE THE CALIFORNIA LEGISLATURE CAN EASILY REMEDY ANY FLAW

A. Few States Have Adopted California's Discriminatory Penalty Scheme.

While asserting that it is "important to the states" to preserve a lopsided penalty scheme, Pet. 13, the State, in the next breath, furnishes the best evidence that it is not: The State lists only "six other states," and not a single local government, "hav[ing] statutes similar" to California's. Pet. 14. Even by the State's own estimation, then, that means that nearly nine out of ten states—and countless local governments—have found more conventional and evenhanded ways to protect the integrity of their police misconduct investigations.

Even that meager estimate exaggerates the national importance by 50 percent. In truth, only four of the six states currently have statutes similar to California's. The two statutes the State misdescribes are themselves illustrative of why the question presented here is not a question of burning national importance.

First, the New Hampshire law invoked by the State applies to reports of all criminal offenses, not just police misconduct; and it prohibits falsely reporting that *anyone* has committed a crime, not just a police officer. *See* N.H. Rev. Stat. Ann. § 641:4 (2005); *State v. Hill*, 146 N.H. 568, 575, 781 A.2d 979, 986 (2001); *State v. Allard*, 148 N.H. 702, 707, 813 A.2d 506, 510-11 (2002). More importantly, this statute prohibits all false statements about a criminal offense whether those statements inculpate or exculpate the alleged

offender. N.H. Rev. Stat. Ann. § 641:4(II) (2005). The statute thus avoids the precise defect that doomed the California statute.

Conversely, the Nevada statute *did* share the same defect as the California statute, but the state legislature repealed the statute. *See* Nev. Sen. Bill No. 150 (repealing Nev. Rev. Stats. 199.325(1)). The repeal came in response to a district court decision finding the statute violated the First Amendment three years before the Ninth Circuit reached that same conclusion here. *Eakins v. Nevada,* 219 F. Supp. 2d 1113 (D. Nev. 2002). As if to underscore just how inconsequential the ruling is to a state's interests, Nevada did not bother appealing before repealing. Instead, before the Ninth Circuit even weighed in on the question, Nevada opted to cover reports of police abuse in a broader statute that penalizes false reports of crimes, whether or not committed by police officers. *See* Nev. Rev. Stat. Ann. § 207.280 (2004).

The remaining four state statutes featured in the Petition were passed within the last decade—three in the past five years alone. *See* Minn. Stat. § 609.505(2) (2005) (effective Aug. 1, 2005); Ind. Code Ann. § 35-44-2-2(d)(5) (2006) (effective June 30, 2003); Ohio R.C. Ann. § 2921.15(B) (2006) (effective Mar. 22, 2001); Wis. Stat. Ann. § 946.66 (2006) (effective May 12, 1998). The State offers no reason to believe that the discriminatory penalty was integral to the thinking of those legislatures in adopting those statutes.

B. Even for California, It is Not Critically Important to Maintain the Discriminatory Approach, and the Flaw Is Easily Remedied.

Even for California, the facts belie the State's claim that the Court of Appeals has dealt a "grave" blow, Pet. 6, to "[t]he integrity of the peace officer misconduct reporting system," Pet. 10.

The only evidence the State points to in support of this assertion is this observation: "The Los Angeles District Attorney's Office, the largest ... in the state, as well as other [unnamed] district attorney's offices in the state, has advised the law enforcement agencies ... that attempts to enforce section 148.6 may result in federal civil rights liability for an officer who arrests for a violation of the statute." *Id.* To assess how grave a problem that is, one might ask, "How many people have been charged under this section?" Tr. 63. That was what the Court of Appeals asked the State during oral argument. The State's response was that section 148.6 is "a rarely enforced statute." *Id.* The State had "researched" the question and was able to come up with only one other prosecution in the decade-long history of the statute—the one that yielded the California Supreme Court's decision on section 148.6. *Id.* Calling this "an important state penal statute," Pet. 10, is like calling the appendix an important bodily organ.

Notably, the Court of Appeals did not create the status quo the State bemoans. More than five years ago, a federal court in the Central District of California—which embraces Los Angeles and its large prosecutorial force—declared the statute invalid in a civil suit brought to challenge the law on its face, *see Hamilton v. City of San Bernardino*, 107 F. Supp. 2d 1239 (C.D. Cal. 2000), and nearly two years ago,

the same court permanently enjoined enforcement of the statute on the ground that it is unconstitutional, *see Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1095 (C.D. Cal. 2004). As the Court of Appeals pointed out, the defect "is easily cured." App. 26a. All the legislature has to do is amend the law to treat all witnesses the same. *Id.* Yet, the state legislature has not seen fit to step into the breach and amend the statute.

The legislature has sat idle, not because of political gridlock, but because of legislative apathy. Section 148.6, backed by a powerful law enforcement lobby, originally passed with overwhelming majorities in both the State Senate (32-2) and State Assembly (70-3). With similar margins, the legislature has since passed two bills adding, and then enhancing, a related provision to protect officers from false complaints. *See* Cal. Penal Code § 832.5(c).[2] The legislature could and would fix the flaw—tomorrow—if law enforcement sensed a pressing need. *See infra* at 24-26 (rebutting the State's asserted "policy concerns" about the proposed fix). The legislature's idleness is evidence of the statute's true salience.

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[2] In 1996, the legislature added a provision (codified as Cal. Penal Code § 832.5(c)) requiring that "frivolous," "unfounded," or "exonerated" complaints of misconduct be removed from officers' personnel files and placed in a separate file. *See* Stats. 1996 ch. 1108 § 1 (AB 3434). The bill passed the State Senate by a vote of 27-2 and the Assembly by a margin of 64-7. In 1998, the legislature expanded the protection by prohibiting use of the removed complaints in decisions on promotions or sanctions. *See* Stats. 1998 ch. 25 § 1 (AB 1016). This bill passed the Senate, 36-0, and the Assembly, 75-1.

It is no wonder that not a single judge among the Ninth Circuit's 24 active judges considered this case important enough to warrant en banc review.

II. THE COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT, INCLUDING THE CALIFORNIA SUPREME COURT.

The State does not assert that the Court of Appeals's ruling conflicts with the ruling of any other circuit. To the contrary, except for the District Court in this case, every federal judge to consider this sort of statute has found it unconstitutional, including the Magistrate Judge and all three members of the appellate panel in this case, plus three other federal district judges in four cases.[3]

Because the handful of similar state statutes are so new and so rarely enforced, there has been virtually no other legal activity beyond these few cases. With only one exception, the statutes that the State considers comparable—from Minnesota, Indiana, Ohio, Wisconsin, New Hampshire, and Nevada (as amended)—have not yet been judicially tested. The only exception is a ruling from a municipal judge in Ohio, declaring that state's statute unconstitutional. *See State v. English*, 120 Ohio Misc. 2d 16, 776 N.E.2d 1179

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[3] *See Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1095 (C.D. Cal. 2004) (striking Cal. Penal Code § 148.6); *Eakins v. Nevada*, 219 F. Supp. 2d 1113, 1121 (D. Nev. 2002) (striking Nevada statute); *Gritchen v. Collier*, 73 F. Supp. 2d 1148, 1153 (C.D. Cal. 1999) (striking "civil equivalent" of § 148.6), *rev'd on other grounds*, 254 F.3d 807 (9th Cir. 2001); *Haddad v. Wall*, 107 F. Supp. 2d 1230, 1238 (C.D. Cal. 2000) (same), *vacated on other grounds*, 48 Fed. Appx. 279 (9th Cir. 2002) (unpublished opinion).

(Elyria Muni. Ct. 2002). Even there, the courts continue to enforce the statute. *Baldwin's Ohio Practice Criminal Law*, § 110.10. All of which means that the First, Sixth, Seventh, and Eighth Circuits—and the trial and appellate courts in those states—will have ample opportunity to weigh in on the constitutional questions and air any disagreement with the Court of Appeals's ruling in this case.

The State does not suggest otherwise. Its argument of irrevocable conflict focuses only on a single opinion from the California Supreme Court. Pet. 8 (citing *People v. Stanistreet*, 29 Cal. 4th 497 (2002), *cert. denied*, 538 U.S. 1020 (2003)). But that case is not in conflict with the opinion presented here for review because the two cases examined *different* challenges to the statute.

As we have seen, in this case, the Court of Appeals premised its holding on a viewpoint discrimination argument: that section 148.6 amounted to unconstitutional *viewpoint* discrimination because it punished only accusations against peace officers *and not statements in support of peace officers*. *See* App. 24a. The California Supreme Court did not address that argument. It addressed a completely different *content* discrimination argument, that "section 148.6 gives protection to peace officers that the Legislature has not given to others.... 'It is not a crime to knowingly make such an accusation against a firefighter, a paramedic, a teacher, an elected official, or anyone else.'" *Stanistreet*, 29 Cal. 4th at 503 (quoting intermediate court's ruling); *see id.* at 507 (quoting argument from brief).

In rejecting that argument, the California Supreme Court said nothing about the theory the Court of Appeals addressed here. It never even mentioned the words "viewpoint discrimination." Conversely, here, the Court of Appeals, acknowledged the difference between the two arguments,

noting that Mr. Chaker *also* presented the content discrimination theory—the very theory rejected by the California Supreme Court. App. 24a n.10; *see supra* at i (preserving alternative theory for affirming).

Simply put, the purported conflict is not "true, permanent, genuine, and current," Pet. 10; it is false, avoidable, hypothetical, and remote. Since there is no pressing need to take the case now, this Court should allow this issue to percolate in the lower courts to see whether a genuine conflict ever materializes.

III. THE COURT OF APPEALS'S RULING WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF RECENT SUPREME COURT DECISIONS TO A NEW SET OF FACTS

In concluding that California's discriminatory speech penalty was unconstitutional, the Court of Appeals conducted a painstaking analysis of the controlling precedents. The central precedent is *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which held that even where a state has the power to proscribe speech (there, fighting words), it may not "impose special prohibitions on those speakers who express views on disfavored subjects," much less on those who express disfavored subjects. *Id.* at 391. This Court applied this principle more recently to another statute in *Virginia v. Black*, 538 U.S. 343 (2003).

The State urges this Court to revisit the doctrinal arena again just three years later. While noting that this Court has resolved some "vexing, yet critical" issues in this field, Pet. 5, the State does not contend that this Court's analysis left open any "vexing" question that lies at the heart of this case. Rather, the State's challenge to the Court of Appeals's analysis revolves around more mundane disagreements about

how best to apply the established principles to the peculiar—and uncommon—regulation presented here. This Court should deny *certiorari* both because these fact-bound disputes are not worthy of its attention and because the Court of Appeals correctly resolved them.

A. The Court of Appeals's Ruling Applied Established Precedents Faithfully to Find the Statute Viewpoint Discriminatory.

The Court of Appeals's analysis unfolded in three basic steps, the first two of which the State scarcely challenges. First, the Court of Appeals observed that *R.A.V.*'s holding about fighting words applies with equal force to libel, which is to say, to statutes, like section 148.6, that impose criminal penalties for allegedly false statements. While the State half-heartedly "suggest[s]" that perhaps *R.A.V.*'s principles are inapplicable to libel statutes, it does not suggest that this Court, or any court, has ever hinted at such a carveout. *See* Pet. 13. To the contrary, in reaching its conclusion about fighting words, this Court took for granted that "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *R.A.V.*, 505 U.S. at 384 (emphasis in original).

Second, the Court of Appeals concluded that this is exactly what section 148.6 does. As a factual matter, the Court of Appeals concluded that section 148.6 proscribes only libel (knowingly false accusations) critical of certain government officials (peace officers) in connection with investigations of police misconduct, while allowing other participants in the same investigation to lie with impunity. App. 22a. The Court of Appeals illustrated how the differential treatment plays out specifically on the facts of this case:

> At Chaker's criminal trial, the witness who observed Chaker's arrest testified that she saw no signs of excessive force during Chaker's arrest. However, had the witness made this statement to the investigator charged with investigating Chaker's complaint, knowing the statement to be false, the witness would not have faced criminal sanction under section 148.6. Similarly, had Officer Bradberry made a knowingly false statement to the investigator charged with investigating Chaker's complaint, Officer Bradberry would not have faced criminal sanction under section 148.6. It is only Chaker, who filed a complaint of peace officer misconduct complaining that Officer Bradberry mistreated him in the course of the arrest, who faced criminal liability under section 148.6.

App. 24a. Although the State unsuccessfully quarreled with this factual premise below, at least as it relates to the accused officer, *see* App. 25a-26a, its Petition does not press that argument.

Third, from this factual observation, the Court of Appeals found "the Supreme Court's analysis in *R.A.V.* controlling." App. 24a. As the Court of Appeals explained, "Like the ordinance at issue in *R.A.V.*, section 148.6 regulates an unprotected category of speech, but singles out certain speech within that category for special opprobrium based on the speaker's viewpoint." *Id.* Specifically, "[o]nly knowingly false speech *critical* of peace officer conduct is subject to prosecution under section 148.6." *Id.* (emphasis in original). In contrast, "[k]nowingly false speech *supportive* of peace officer conduct is not similarly subject to prosecution." *Id.* (emphasis in original). Accordingly, the Court of Appeals held, "the statute impermissibly regulates speech on the basis of a speaker's viewpoint." *Id.* (footnote omitted).

The State rejects this logic as "facile," asserting that "[a] knowingly false statement ... is neither 'critical' nor 'supportive,'" but "simply false." Pet. 19. "Such false statements," the State argues, "do not express a 'viewpoint' as that term is understood for purposes of the Free Speech Clause." *Id.* To the contrary, when this Court observed that "the government ... may not ... proscrib[e] *only* libel critical of the government," *R.A.V.*, 505 U.S. at 384, it confirmed that lies are at least as prone to advancing viewpoints as fighting words or obscenity. The relevant question is whether one perspective within a discrete forum triggers the penalty while the opposite perspective does not—whether the government is trying to "license one side of a debate" and burden the other. *Id.* at 392. The debate over whether a peace officer is guilty of misconduct is no exception to the rule, and the fact that this debate unfolds in the course of an investigation, and "not a debating society, a community bulletin board, a public park or sidewalk" is of no constitutional relevance. Pet. 19.

The State also argues, in various ways, that the Court of Appeals erred in focusing on the *investigation* rather than narrowly on the *complaint*. In one formulation, the State argues that section 148.6 creates a "special forum," which it describes as a "peace officer misconduct reporting 'forum,'" and is therefore justified in regulating only the accusations of misconduct. Pet. 17-18 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), a "limited public forum" case). Putting aside that there is no such breed in this Court's forum taxonomy as a "special forum," the flaw in the State's analysis is that it is misdescribing the forum. If the point of the forum were to air gripes about peace officers in the interest of catharsis, it might be appropriate to call this a "peace officer misconduct reporting 'forum.'" But since, as the State recognizes, the purpose is

"to receive such complaints" in order to "investigate [them and] report and keep records concerning such investigations," the only appropriate description of the "forum" is a "peace officer misconduct *investigation* forum," or, as the State itself puts it elsewhere in its Petition, "a 'special forum' ... to ensure police accountability." Pet. 8; *see also* App. 22a. The complaint is simply the mechanism by which the civilian gains access to the investigation. *See* App. 17a ("our First Amendment analysis focuses solely on the application of section 148.6 within the context of the complaint investigation process"). Having established that forum for both sides of the debate, the State is not free to burden one side and let the other side "fight freestyle." *R.A.V.*, 505 U.S. at 392; App. 24a.

In a related vein, the State disputes the "premise that all false reports or statements concerning allegations of peace officer misconduct, whether the initial false allegation which prompts an investigation *or* a false statement in the course of such an investigation, are equally pernicious and deserving of regulation." Pet. 11 (emphasis in original). As the State sees it, the false accusation—or, as the State calls it, "the false alarm"—is "more pernicious, and therefore more deserving of regulation," than an abusive officer's lie denying the abuse or a trumped-up witness's lie exonerating the abusive officer. Pet. 15.

The State could not possibly make the assertion that the accuser's lies are worse than police lies if it focused on the primary purpose served by California's police-complaint scheme—to ensure that police abuses are exposed and punished. *See* App. 22a. Just as disabling a real fire alarm to let a building burn inflicts more damage than setting off a false alarm, so, too, false denials of misconduct undermine the purposes of an investigatory structure more than false accusations. The victim of a false alarm—the unfairly

accused officer—has a statutory right to wipe his record clean and can suffer no lasting consequences. *See supra* at 13 n.2. In contrast, the victims of a corrupt officer will multiply over time, will suffer far more, and will obtain neither justice nor redress as long as the officer gets away with his lies.

Instead, the only way the State can support its counterintuitive assertion is by focusing exclusively on one dimension of the problem of false statements, the wasted resources, to the exclusion of the overarching goal. Even if such a myopic focus were proper, the Court of Appeals persuasively demonstrated that "a peace officer or witness who lies during an investigation is equally to blame for wasting public resources by interfering with the expeditious resolution of an investigation." App. 22a. As the court pointed out, "[t]he state's asserted interest in saving valuable public resources and maintaining the integrity of the complaint process is therefore called into question by its choice to prohibit only the knowingly false speech of those citizens who complain of peace officer conduct." *Id.* (citation omitted).

The State incorrectly describes this last point as an impermissible "underinclusiveness" test. Pet. 11. As the State puts it, "the Ninth Circuit adverted exclusively to an underinclusiveness analysis based upon the notion there is a suspect exemption of certain speech from the reach of the statute—speech '*supportive*' of a police officer." *Id.* (emphasis in original). This was the very same criticism this Court rebutted in *R.A.V.* *See* 505 U.S. at 387. As the Court explained, "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation"—and obviously, a "viewpoint discrimination" limitation—"upon a State's prohibition of proscribable speech." *Id.* The argument that the Court of Appeals

adopted, like the argument this Court adopted in *R.A.V.*, is an argument about viewpoint. That analytical truth is not undermined by the fact that the Court of Appeals, at one point in a lengthy opinion, imprecisely used the word "under-inclusiveness" to describe the viewpoint discrimination. App. 23a.

B. The Court of Appeals Did Not Err In Declining to Enumerate the Three *R.A.V.* Exceptions and Address Them Individually.

Completely apart from the inherent logic of the Court of Appeals's analysis, the State argues that the court below erred in failing to "mention" explicitly "the three categories which render content regulation permissible under the First Amendment." Pet. 11. The State is referring to this Court's observation in *R.A.V.* that there are circumstances in which "*content* discrimination among various instances of a class of proscribable speech ... does not pose th[e] threat" that "'the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *R.A.V.*, 505 U.S. at 387 (emphasis added) (quoting *Simon & Schuster*, 502 U.S. 105, 116 (1991)).

There are two responses to this criticism. First, the Court of Appeals was not obliged to consider these three circumstances, because it found not merely content discrimination but outright viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) ("viewpoint discrimination," unlike content discrimination, "is presumed impermissible when directed against speech otherwise within the forum's limitations"); *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641-43 (1994) (intermediate scrutiny for regulation is unavailable where the regulation discriminates on the basis

of viewpoint). This Court has not held that these exceptions could salvage a viewpoint discriminatory statute. More importantly, although the Court of Appeals did not enumerate all three exceptions and address them one by one, it *did* acknowledge the exceptions, App. 19a, and rejected as meritless claims regarding the only two exceptions that could arguably apply.

In particular, the Court of Appeals quoted verbatim the exception that applies where "'the basis for the content discrimination consists [entirely] of the very reason the entire class of speech at issue is proscribable.'" *Id.* (quoting *R.A.V.*, 505 U.S. at 388). The Court could not have been clearer that it believed that "the very reason the entire class of speech at issue is proscribable"—because false speech undermines the integrity of the investigation and wastes resources—does *not* justify California's lopsided punishment. App. 22a.

Similarly, the Court of Appeals rejected the third exception, which applies where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The Court of Appeals held that "'[s]uspicion that viewpoint discrimination is afoot is at its zenith'" in this case because "section 148.6 is necessarily limited to criticism of government officials—peace officers." App. 23a. As the Court of Appeals observed, because "the same entity against which the complaint is made will be investigating the accusations" of misconduct, criminalizing false allegations against the police inevitably tends to "'chill' the willingness of citizens to file [even legitimate] complaints." App. 14a (citation and internal quotations omitted). Limiting liability for false statements to only those who make the accusation exacerbates this chilling effect without advancing the stated

aim of preserving the integrity of the citizen complaint process. App. 22a-24a.

All that remains is the second exception, where "a content-defined subclass of proscribable speech ... happens to be associated with particular 'secondary effects.'" *R.A.V.*, 505 U.S. at 389. But that exception is obviously inapposite, which is presumably why the State does not mention it and the Court of Appeals did not address it. The accusations are subject to punishment because the State wishes to eliminate the category of speech—false complaints—not because of some secondary effects they yield. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986) (defining secondary effects); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (same).

In the end, the State urges this Court to grant review because the Court of Appeals did not explicitly say it was doing what it was quite plainly doing. If this Court does not sit as a court of errors, it certainly does not sit to discipline lower courts to show all their work en route to the right answer.

C. The State Has No Compelling Interest In Adhering to a Discriminatory Penalty Structure

The State does not argue—at least not explicitly—that its interests in adhering to the lopsided penalty structure could satisfy strict scrutiny. But it does complain that the more evenhanded structure—in which "the State ... simply outlaw[s] all false statements to law enforcement officials in the course of an official investigation" of police misconduct—"raises significant policy concerns." Pet. 16-17. The State mentions two concerns in particular, neither of which overcomes the First Amendment defect.

First, the State asserts that evenhanded regulation of all statements in the course of an investigation of police misconduct would "potentially chill a broad range of statements in a myriad of circumstances." Pet. 17. As we have seen, there is no question that the prospect of a criminal penalty could chill potential *complainants* with legitimate complaints. *See Friedman v. United States*, 374 F.2d 363, 369 (8th Cir. 1967); App. 14a. It is much harder to see how extending the penalty would "chill" the participation of others. Surely, the officer who is the target of the misconduct complaint will not be chilled from participating to defend himself, except to the extent that the added penalty might "chill" his inclination to lie. The same is true of the fellow officer, or innocent bystander, who would offer exonerating testimony. No doubt, the criminal penalty will make each think twice about lying to save the accused officer's hide, but it is unlikely to chill them from participating at all.

In a related vein, the State insists such an evenhanded approach "could work great mischief in the hands of an unscrupulous or biased police officer or prosecutor." Pet. 16-17. But it does not say how. Under the version of section 148.6 the legislature passed, the "unscrupulous ... police officer" accused of misconduct has every incentive to lie. Placing the threat of prosecution on him merely counterbalances the incentive structure. In referring to a "biased police officer or prosecutor," the State is evidently focusing on the law enforcement personnel conducting the investigation. A biased investigator may confront two scenarios: (1) he erroneously believes the accusation is a lie and is bent on prosecuting the accuser; or (2) he erroneously believes the accused officer's defense is a lie and is bent on prosecuting the accused officer for propounding the defense (and not just for the underlying conduct) and every witness

who supports his false story. There is little reason to believe scenario 2 would materialize with much frequency, but even if it arises, it cannot be possibly more likely than scenario 1. If the State is content to live with the potential mischief caused by scenario 1, then it cannot credibly claim to be concerned about the potential mischief of scenario 2.

IV. THIS HABEAS CORPUS CASE IS NOT A PROPER VEHICLE FOR RESOLUTION OF THE ISSUE PRESENTED ON THE MERITS

Even if the questions presented in this case were suitable for this Court's review, the Court should await another opportunity to address these issues, for this habeas corpus appeal is an unsuitable vehicle. For three reasons, the unique procedural posture means that this case does not present the merits question cleanly and possibly not at all.

First, Mr. Chaker was denied an evidentiary hearing in which to explore, and challenge, the State's justifications for section 148.6's differential penalty. *See* App. 36a, 45a. The record is, therefore, limited to little more than snippets of legislative history.

Second, on appeal, the State and its amici raised four arguments that the Court of Appeals had to address because they were (or were asserted to be) jurisdictional. *See* App. 8a-10a & n.4 (addressing one argument on jurisdiction, one on mootness, one on standing, and one couched as a jurisdictional bar arising from the statute of limitations). For example, the State's leading argument on appeal, and in its en banc petition, was that Mr. Chaker's habeas corpus petition became moot once his probation had expired. *See* App. 8a-9a. The Court of Appeals rejected this particular jurisdictional argument on the strength of this Court's precedent that a habeas petition that is pending beyond the

petitioner's custody becomes moot only if there is no possibility of collateral legal consequences that flow from the conviction, *see Sibron v. New York*, 392 U.S. 40, 57 (1968), as embellished by Ninth Circuit law pronouncing an irrebutable presumption that there are always "collateral consequences" from any conviction, including a misdemeanor conviction. *See Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994); *Larche v. Simons*, 53 F.3d 1068, 1070 n.1 (9th Cir. 1995). In its petition for rehearing en banc, the State asserted that the Ninth Circuit presumption is incorrect in light of intervening authority from this Court. *See Spencer v. Kemna*, 523 U.S. 1 (1998).

This position is incorrect, for reasons Mr. Chaker explained below. But the point here is a simpler one: The State does not suggest that this issue is independently *cert.*-worthy, and for good reason: (1) the Ninth Circuit standard is consistent with the law of other circuits; (2) Mr. Chaker can demonstrate a concrete collateral consequence independent of any presumption; and (3) the circumstance is unlikely to arise again, except perhaps where, as here, the state has waived other habeas defenses designed to limit the longevity of habeas relief, like the statute of limitations, procedural default, and independent and adequate state grounds. *See* App. 9a-12a (finding these defenses waived). Nevertheless, if this Court accepts this case for review, it will have to labor through the issue anyway—along with each of the other three jurisdictional arguments—before reaching the merits. In the best case scenario, this Court will waste inordinate resources to get to the merits. But if the State has its way, this Court will never even reach the merits of the question the State presses for review.

Third, even if this Court does reach the merits, the State will undoubtedly try to persuade it to apply a standard of review that disposes of this habeas case without definitively

resolving the constitutional question. As noted above, the State had persuaded the Magistrate Judge that he was required to deny habeas relief even though he believed the statute was unconstitutional, and had persuaded the District Court to apply only "clearly established federal law" and some level of deference to the state court judgment. *See supra* at 6-7.

As the Court of Appeals understood, de novo review was appropriate, since there was not a state court ruling on the merits to which to defer. App. 12a; *see Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Moreover, the State has waived any more deferential standard of review by not pressing it in its Petition to this Court. But that will not necessarily stop the State from urging the Court to adopt a deferential standard in this case. If it tries to do so, this is yet another issue this Court will have to plod through en route to the merits. And in the event the State succeeds, it will not have managed to save the statute; it will simply have managed to secure from this Court an unedifying ruling that there are arguments in defense of the statute that are reasonable or arguments against the statute that had not yet been "clearly established" when the habeas petition was filed.

At best, then, the State is asking this Court to navigate a procedural obstacle course to reach the question presented for review. At worst, the State is presenting an issue that the Court will find itself constrained not to reach. Either way, this Court would be better served by awaiting a more suitable vehicle—whether on direct appeal from a conviction or on a facial challenge to the statute.

One such case is practically at the Court's doorstep. The district court's ruling in *Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087 (C.D. Cal. 2004), enjoining section 148.6 as facially unconstitutional, is currently pending on

appeal in the Ninth Circuit. If this Court is eager to decide the issue presented, it would be well advised to wait the extra few months for that case, which presents the issue cleanly and on a full summary judgment record.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Joseph H. Fagan
Alexander M.R. Lyon
Brian D. Kaider
HELLER EHRMAN LLP
1717 Rhode Island Avenue, NW
Washington, DC 20036
(202) 912-2000

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Counsel for Respondent

APPENDIX

STATUTORY ADDENDUM

California Penal Code § 148.6 provides:

148.6. False allegations of misconduct against peace officers; advisory form; signature; civil claims intended to harass or dissuade officer

(a) (1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.

(2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CITIZENS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CITIZEN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.

IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

I have read and understood the above statement.

_____

Complainant

(3) The advisory shall be available in multiple languages.

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

(4)

No. 05-1118

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IN THE SUPREME COURT OF THE UNITED STATES

ALAN CROGAN, CHIEF PROBATION OFFICER, and
THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioners,

v.

DARREN DAVID CHAKER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BONNIE M. DUMANIS
San Diego County District Attorney
JESUS RODRIGUEZ
Assistant District Attorney
KIM-THOA HOANG
Deputy District Attorney
KELLY M. RAND
Deputy District Attorney
330 W. Broadway, Suite 920
San Diego, CA 92101
Telephone: (619) 685-6535
Fax: (619) 515-8632

Counsel for Petitioner Alan Crogan, Chief Probation Officer

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
STEVEN T. OETTING
Deputy Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
Counsel of Record
State Bar No. 72556
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2275
Fax: (619) 645-2271
Counsel for Petitioner The People of the State of California

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-1118

ALAN CROGAN, CHIEF PROBATION OFFICER and THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

DARREN DAVID CHAKER, *Respondent.*

Petitioners Alan Crogan, Chief Probation Officer, and The People of the State of California[1/] submit this brief in reply to Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

A.. The Ninth's Circuit's Decision Clearly Conflicts With The California Supreme Court's Opinion In *Stanistreet* and Review Is Appropriate

1. Chaker claims that the Ninth Circuit's decision does not conflict with the California Supreme Court's opinion in *People v. Stanistreet*, 29 Cal. 4th 497, 58 P.3d 465, 127 Cal. Rptr. 2d 633 (2002), *cert. denied*, 538 U.S. 1020 (2003), because the Ninth Circuit struck down California Penal Code section 148.6 based on a holding that it constituted unconstitutional *viewpoint*

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1. Chaker disputes that The People of the State of California is a proper party to petition the Court. Opp. at 1. The People of the State of California was named as a Respondent by Chaker in his original Petition for Writ of Habeas Corpus and appear as a Respondent on the docket of the district court and on the docket of the Ninth Circuit, and appears as a named Respondent in the Ninth Circuit's opinion. App. at 2a. The Attorney General was entitled to notice, which he did not receive, and to intervene on behalf of the State in both the district and circuit courts. 28 U.S.C. § 2403(b); Fed. R. App. P. 44(b). Further, Petitioner Crogan is represented by the District Attorney of San Diego, who is on the Petition with the California Attorney General.

discrimination, while the California Supreme Court addressed only a *content* discrimination challenge and did not address a *viewpoint* argument. Opp. at 15. Chaker asserts the California Supreme Court "never even mentioned the words 'viewpoint discrimination.'" Opp. at 15. These assertions simply misrepresent the California high court's decision.

First, in *Stanistreet*, the California Supreme Court framed the issue presented by quoting the defendants' own summary of their argument that section 148.6 is unconstitutional as raising both a "'content and *viewpoint*-based distinction. . . .'" 29 Cal. 4th at 507, italics added. Second, and most critically, the California Supreme Court, unlike the Ninth Circuit, tested and passed section 148.6 under all three categories of *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). 29 Cal.4th at 508-10. The California Supreme Court expressly recognized that categories of speech regulation falling within the three *R.A.V.* exceptions could not, by definition, be considered impermissibly viewpoint discriminatory: "The high court identified three categories of content discrimination that do not threaten to drive ideas or *viewpoints* from the marketplace and hence are permissible. (*R.A.V.*, *supra*, 505 U.S. at pp. 388-390)." *Stanistreet*, 29 Cal. 4th at 508, italics added. .

The first category of *R.A.V.*, as the *Stanistreet* court recognized, is explicitly a *viewpoint* test. "'When the basis of the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or *viewpoint* discrimination exists.'" 29 Cal.4th at 508, *quoting R.A.V.*, 505 U.S. at 388, italics added. The state high court found that just as this Court held the federal government may criminalize threats against the President because such threats have "special force" when applied to the person of the President, so, too, the California Legislature can criminalize a false allegation of misconduct against a peace officer because *uniquely* the report of a false allegation against a peace officer requires a mandatory investigation and reporting. Thus, the reason the entire class of speech at issue is proscribable has "special force" when applied to a peace officer in this circumstance.

The third category of *R.A.V.* is likewise a *viewpoint* test–"to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination

is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The California Supreme Court found that section 148.6's creation raised "no realistic possibility of official suppression of ideas." *Stanistreet*, 29 Cal. 4th at 511. This is an explicit determination that section 148.6 does not suffer from *viewpoint* discrimination.

Thus, contrary to Chaker's assertions, the *Stanistreet* decision *expressly* recognized the issue presented to be one of *viewpoint* discrimination, appreciated the role of the three *R.A.V.* exceptions as categorically screening for viewpoint discrimination, and found California's statute fit within these three exceptions precisely because there was no *viewpoint* discrimination. It is simply incorrect to state that the *Stanistreet* decision did not address a *viewpoint* argument, let alone that it did not mention the words "viewpoint discrimination."

Additionally, Chaker's argument ignores the fact that "[v]iewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, the first and third of *R.A.V.*'s tests screen for *viewpoint* discrimination. Contrary to Chaker's suggestion, content and viewpoint discrimination cannot be neatly separated; they are on a continuum. *See*, *R.A.V.* at 391, noting "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."

Finally, Chaker argues that the Ninth Circuit applied "standard viewpoint discrimination principles," Opp. at 1, specifically "the central precedent,"–R.A.V. Opp. at 8, 16-17. It defies reason and logic to argue that two courts applying the same precedent, but arriving at diametrically opposite conclusions regarding the constitutionality of a statute, are not in conflict. To illustrate the point, one need look only to the district court opinion Chaker trumpets, *Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087 (C.D. Cal. 2004),[2/] which applied the *R.A.V.* tests

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2. Chaker misleads the Court in suggesting that *Hamilton* has enjoined the enforcement of section 148.6 in California for the past two years. Opp. at 12-13. That injunction was limited to the City of San Bernardino, and the decision and order have been stayed while the case is on appeal, which, itself, is stayed. Ninth Circuit, Nos. 05-56640/04-56568. With the exception of caution generated by the circuit court's decision below, California Penal Code section 148.6 remains fully in force in the State of California to this day.

and found the statute f[illegible] each of those tests and was viewpoint discriminatory. That court concluded that its decision was in conflict with the "contrary view in *Stanistreet*." *Id.* at 1095. One cannot lay the Ninth Circuit's *Chaker* opinion alongside *Stanistreet* and conclude that they do not fundamentally conflict in their conclusions of law regarding *viewpoint* discrimination, to say nothing of the real-world conflict resulting from the state court finding the statute constitutional and the federal court declaring it unconstitutional.

2. There is no need to allow the issue "to percolate in the lower courts," as Chaker suggests. Opp. at 16. It is enough that the highest court of the most populous state in the Union, a state which has blazed a trail now being followed by other states in legislating peace officer accountability statutes, is directly at odds with the largest federal circuit on a matter of constitutional interpretation. *See, Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 155 (2000); *Florida v. White*, 526 U.S. 559, 563 (1999). There is no need for a split among the federal circuits. The issue has been explored at length by four district courts in California and Nevada, respectively, the California Court of Appeal, the California Supreme Court and now the Ninth Circuit. There is little more that other courts, including other federal courts, could add; and Chaker fails to suggest anything.

3. Chaker's suggestion that the statute is unimportant because prosecutions under it are rare,[3/] Opp. at 2, 12, is unpersuasive. The statute is important because of its prophylactic effect. It requires that a citizen who seeks to file a complaint of peace office misconduct be warned in writing that a knowingly false report of misconduct might result in prosecution. Thus, it acts to prevent false allegations from being made in the first place. The statute's efficacy and importance can be measured in the prevention of false accusations, not the number of prosecutions

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3. Chaker cites to a statement made by a private attorney who argued as *amicus* in the circuit court that he knew of only one other prosecution under section 148.6. Contrary to Chaker's assertion, this was not the response of the "State" or "its lawyers" and that attorney stated he had looked only to three counties. No offense-specific statistics are kept on misdemeanor prosecutions in California, thus we do not know how many prosecutions have been brought under the statute, nor do we know how many false reports section 148.6 has prevented.

under the statute, i.e., when the statute fails to have its intended effect. The circuit court's decision, if left intact, will strip the police misconduct reporting scheme of this critical protection.

If Chaker is correct that prosecutions under the statute are rare, that argues in favor of the grant of certiorari in this case. While misdemeanor conduct is commonplace, it is rare that a misdemeanor prosecution is litigated through both the state and federal courts and lands on this Court's doorstep. *See, e.g., Kolender v. Lawson*, 461 U.S. 352 (1983). Contrary to Chaker's argument, there is not "ample opportunity" to speak on this issue. Opp. at 15. Moreover, the chill the circuit court's opinion has had and will continue to have on the enforcement of section 148.6, *see*, Pet. at 10, makes it even more critical that the Court accept *this* case.

Finally, though Chaker asserts the issue is not worthy of this Court's review, out of the other side of his mouth, he asks the Court to wait for the *Hamilton* case to work its way to the Court. Opp. at 3, 28. Briefing in that case has been stayed in the Ninth Circuit for over a year and half and no briefs have been filed to date. This case was pending in the circuit court for over two years. Further, there is no reason to believe that the three-judge panel in the Ninth Circuit which decides *Hamilton* will add anything new or different, and indeed, that panel will be bound by the decision under challenge here as "circuit precedent." *United States v. Rodriguez-Lora*, 421 F.3d 932, 943 (9th Cir. 2005). While the State of California waits, the confusion and conflict spawned by the circuit court's opinion will continue.[4]

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4. Chaker argues that this case "comes wrapped in an awkward habeas corpus posture." Opp. at 3, 26-28. Not so. Chaker bemoans the denial of an evidentiary hearing below, but the issue is not "fact bound"; it is a pure issue of law–a facial challenge to the constitutionality of a statute. The legislative history of the statute is in the record in the circuit court as it was in the California Supreme Court. The State raised procedural and jurisdictional bars that the Ninth Circuit rejected, App.8a-12a, and the State has abandoned them in this Court. The AEDPA's deferential standard of review, 28 U.S.C. § 2254(d)(1), will not constrain the Court's analysis as the federal law is here "clearly established" in this Court's precedents and because the California Supreme Court rejected Chaker's First Amendment challenge on a procedural basis and did not reach the merits. This Court, like the Ninth Circuit below, App. at 12a, will review the issue *de novo*. *Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002). It is ironic that Chaker seeks to preserve the Ninth Circuit's non-deferential, *de novo* merits determination

B. The Ninth Circuit's Opinion Conflicts With This Court's Decision In *R.A.V.*

Chaker admits that the Ninth Circuit applied an "under-inclusiveness" test which this Court explicitly rejected in *R.A.V.* Opp.at 22. He further concedes that the circuit court did not enumerate and address the three categories or exceptions set out in *R.A.V.* Opp. at 22-23. Most telling, Chaker attempts to excuse the Ninth Circuit for wholly ignoring the second *R.A.V.* category –"secondary effects"–by claiming it is "obviously inapposite." Opp. at 24. To the contrary, *Stanistreet*, which the circuit court refused to address, found that section 148.6 was specifically justified by the "secondary effects" of the knowingly false speech, namely the mandatory investigation and record retention requirements of the statute. 29 Cal. 4th at 509. Yet, Chaker asserts throughout his brief that the Ninth Circuit simply applied standard viewpoint discrimination principles—*R.A.V.*—to this case. Not so; the Ninth Circuit ignored the commands and directions of this Court, and in doing so undermined this Court's precedent in a published decision.

The Ninth Circuit panel did not "imprecisely" state this Court's rule, nor was it "not obliged" to follow it. Opp. at 22. The circuit court knew the proper analysis because it had been laid out in *Stanistreet,* and by the district court below and in *Hamilton*. Rather than following this analysis in adherence to this Court's decisions, the circuit court cited, but ignored them, and then applied a rule rejected by this Court.

C. The Question Presented Is An Important One

Chaker argues that the validity of section 148.6, and similar statutes in other states, is not important to the states, and in any event, the California Legislature can fix the constitutional flaw discovered by the Ninth Circuit. Opp. at 10-13.

1. California is the most populous state in the Union and has the greatest number of sworn peace officers. The other states which have enacted similar statutes–Nevada, Minnesota, Indiana, Ohio and Wisconsin–each have substantial populations and major urban police departments. As Chaker notes, four of the states

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of this constitutional issue by arguing that this Court must overcome hurdles and suffer constraints on its analysis which did not in the least hinder the circuit court.

which have enacted similar statutes have done so in the last decade, three in the last five years. This suggests an emerging trend toward the adoption of such statutes. The issue is an important one, nationally.

2. Chaker argues that the State of California can easily fix the flaw the Ninth Circuit found in the statute. Opp. at 12-13. Chaker joins the Ninth Circuit in suggesting that the state adopt a sweeping statute, similar to 18 U.S.C. § 1001, which would criminalize all false statements made to law enforcement officials in the course of a misconduct investigation. App. at 26a; Opp. at 12-13, 24-26. The policy concerns underlying this proposition were addressed in the Petition. Pet. at 16-17. In addition to the concerns expressed in the Petition, such a sweeping enactment could very well hamper and chill the investigation of both legitimate and false allegations of misconduct as witnesses, no matter what they had to offer, might be reluctant to respond to police inquiries knowing that their statement, if found to be false by a police officer or prosecutor, could result in their arrest and prosecution. Thus, investigation of official misconduct could be frozen by the specter of criminal prosecution.

Chaker's argument that the statute can be fixed begs the question. The issue is whether the policy expressed by the California Legislature (and five other state legislatures) in section 148.6 violates the First Amendment, not whether it can be made more to the liking of Chaker and the Ninth Circuit. Indeed, in a host of circumstances this facile argument could be offered to preclude the Court from taking up important issues of constitutional interpretation. Such an argument also touches on notions of comity and federalism and the role of the courts versus the legislative branch.

Finally, Chaker claims that Nevada fixed its statute after a federal district court in that state declared a statute very similar to section 148.6 violated the First Amendment. *See Eakins v. Nevada*, 219 F. Supp. 2d 1113 (D.Nev. 2002).[5/] However, this

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5. ~~The~~ statute which the Nevada Legislature enacted to replace the statute struck down in *Eakins*, Nev. Rev. Stats. § 207.280 (2005), provides:

> Every person who deliberately reports to any police officer, [etc.] . . ., that a felony or misdemeanor has been committed, which causes a law enforcement agency to conduct a criminal or internal investigation, knowing such report to be false, is guilty of a misdemeanor.

new statute would be struck down under the circuit court's decision below because, just like section 148.6, a false allegation of criminal misconduct by a peace officer which prompts an internal investigation would be criminalized–the false statement *critical* of the officer–but not a false statement *supportive* of the accused officer in the course of the internal investigation. Because the new statute, like section 148.6, focuses a criminal penalty on the report which prompts an internal investigation and not on statements made in the course of the investigation, this statute is jeopardized in the Ninth Circuit if its decision below stands. This fact serves to underscore the need for review in this case. Section 148.6, like the Nevada statute, is not easily fixed. To do so would require the states to abandon the "false alarm" theory underlying these statutes.

D. The Ninth Circuit's Analysis Is Fundamentally Flawed

Chaker offers a defense of the Ninth Circuit's analysis, Opp. at 17-22, but that defense fails because the circuit court's analysis is fundamentally flawed as a matter of fact and law. The Ninth Circuit's entire analysis is based on the premise that there is a real-world equivalence between the allegation of misconduct filed with the law enforcement agency which triggers the mandatory investigation and reporting–the false statement *critical* of the officer–and a false statement by a witness in the course of the investigation which is *supportive* of the officer. This is a false factual premise because it equates the triggering report with a subsequent witness statement. Additionally, the Ninth Circuit errs as a matter of law in concluding that regulation of a knowingly false report which requires an investigation, solely because it is false, constitutes viewpoint discrimination within the contemplation of the First Amendment.

The Ninth Circuit ignored or failed to comprehend the significance of the "false alarm" theory underpinning section 148.6 and refused to judge the statute fairly within that particular and well-established context. Instead, the circuit court altered the relevant field of inquiry–the complaint which triggers a mandatory investigation–and lumped the initial false report in with any statement made during the resulting investigation. This is a critical factual error.

The allegation of misconduct filed with the law enforcement

agency to which section 148.6 applies serves *solely* to prompt the mandatory investigation and reporting. The complaint, itself, is not evidence or material to the misconduct investigation, itself. It is simply the alarm or trigger. Under section 148.6, no one is subject to penalty for making a false statement during the course of the investigation. Thus, anyone, including the complainant, who makes a false statement in the course of the investigation *critical* of a peace officer is treated no differently from a witness who makes a false statement *supportive* of an officer. It is a false factual premise to compare the initial allegation of misconduct, which has no materiality to the investigation other than to trigger it, with the statements made by the complainant, the officer and other witnesses in the course of the investigation, itself, which do matter. This is the flaw in the Ninth Circuit's analysis and once exposed, its decision crumbles.

The Ninth Circuit erred as a matter of law in finding that section 148.6 discriminates on the basis of the speaker's viewpoint within the contemplation of the First Amendment. As this Court has held, the test whether a regulation discriminates on the basis of viewpoint is whether "the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The rationale behind section 148.6 is to prevent wasteful and harmful misconduct investigations premised on a false report. The only motivating ideology, opinion or perspective of a false reporter is the desire to force the police to undertake what the reporter knows will be a futile and wasteful investigation. In evidence introduced at trial on the charge of violating section 148.6, the City of El Cajon's civil counsel, who defended the city against Chaker's related civil suit, testified Chaker told him, "If all that happens in the case is that the City of El Cajon has to pay your fee of $20,000 and that prevents the City from purchasing one or two patrol cars, then that is acceptable to me." That is not a *viewpoint*. Section 148.6 is not viewpoint discriminatory.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 17, 2006

Respectfully submitted,

BONNIE M. DUMANIS
San Diego County District Attorney

JESUS RODRIGUEZ
Assistant District Attorney

KIM-THOA HOANG
Deputy District Attorney

KELLY M. RAND
Deputy District Attorney

BILL LOCKYER
Attorney General of the State of California

MANUEL MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

STEVEN T. OETTING
Deputy Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

Counsel of Record

Counsel for Petitioner
Alan Crogan, Chief Probation Officer

Counsel for Petitioner
The People of the State of California

GWS:nes
SD2005800280

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In The Supreme Court of the United States

ALAN CROGAN, CHIEF PROBATION OFFICER, and THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioners,

v.

DARREN DAVID CHAKER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JONES & MAYER
MARTIN J. MAYER
MICHAEL R. CAPIZZI
Counsel of Record
KRISTA MACNEVIN JEE
3777 North Harbor Boulevard
Fullerton, California 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448
Attorneys for Amici Curiae, California Sheriffs' Ass'n, California Police Chiefs' Ass'n, and California Peace Officers' Ass'n

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The California State Sheriffs' Association ("CSSA"), the California Police Chiefs' Association ("CPCA"), and the California Peace Officers' Association ("CPOA") respectively submit this brief as Amici Curiae in support of the Petition for Writ of Certiorari made by Petitioners Alan Crogan and the People of the State of California to this Court.[1] Amici endeavor to provide this Court with a broad law enforcement perspective as to the issues in this matter, specifically the facial constitutionality of California Penal Code Section 148.6. Amici submitted similar briefs before the California Supreme Court in its determination of the same issue in *People v. Atkinson (Stanistreet)*, 29 Cal. 4th 497, 58 P.3d 465, 127 Cal. Rptr. 2d 633 (2002), as well as before the Ninth Circuit Court of Appeals in this matter below. The parties have consented to the filing of this brief.

I. INTERESTS OF AMICI CURIAE.

CSSA represents each of the fifty-eight (58) California Sheriffs. CPCA represents virtually all of California's Municipal Chiefs of Police. CPOA represents more than

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[1] No party or counsel for a party authored this brief, in whole or in part. No person or entity other than Amici Curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. This representation is made in compliance with Rule 37.6 of the United States Supreme Court Rules.

four thousand peace officers, of all ranks, throughout the State of California.

Amici frequently represent the interests of their members as Amici Curiae in both federal and state court proceedings. Their collective experience and insight into the inner administrative workings of law enforcement departments throughout the State is highly relevant to this Court's consideration of the impact of the decision below, which strikes down a prohibition against knowingly false claims of misconduct against peace officers.

In particular, Amici are interested in this case because the issues presented will have a profound impact on the members of each of the three Associations as well as every employee under the command of the State's Sheriffs and Police Chiefs. This includes the overwhelming majority of peace officers in the State of California, who are directly impacted by the decision of the Ninth Circuit.

II. SUMMARY OF ARGUMENT.

Amici will argue that certiorari review is needed in this Court in order to state the proper constitutional analysis as to California Penal Code Section 148.6,[2] namely, that it is constitutional in accord with both this Court's precedent and with the California Supreme Court's prior determination of the Section's constitutionality.

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[2] All statutory references are to the California Penal Code unless otherwise noted.

III. ARGUMENT.

As set forth in the Petition for Writ of Certiorari, there are compelling reasons for this Court's review. First, the Ninth Circuit's decision directly conflicts with relevant decisions of this Court. Second, the Ninth Circuit's decision was based on an important federal issue, namely the applicability of the First Amendment of the United States Constitution to a California Penal statute, and that decision conflicts with the California Supreme Court's determination of the very same issue.

Section 148.6 makes it a misdemeanor for anyone to file a knowingly false allegation of misconduct against a peace officer. It is this provision which is at issue in this matter and which the Ninth Circuit found to be an impermissible viewpoint-based sanction. As set forth below, the statute does not give special protection for peace officers not afforded to other public officers or members of the public, especially when Section 148.6 is considered in conjunction with other State statutory provisions. As such, Section 148.6 does not discriminate on the basis of viewpoint.

A. The Ninth Circuit's Opinion Does Not Follow this Court's Precedent in Determining that Section 148.6 is Unconstitutional.

The Ninth Circuit has analyzed Section 148.6 in a manner inconsistent with this Court's precedent, as set forth below. In analyzing Section 148.6, however, it is important first to consider its history and context.

Section 148.6 cannot be considered in a vacuum. It forms a part of a comprehensive set of statutes which address the relationship between a peace officer, his or her employing law enforcement agency, and the public. In

order to understand the context of Section 148.6, the background of the enactment of Section 148.6 must be considered, as well as the context of Section 148.6.

1. Section 148.6 Was Enacted After Section 148.5 (False Report of Felony or Misdemeanor) Was Judicially Construed Not to Apply to Complaints Against Peace Officers.

Section 148.6 was enacted to extend the protection of Section 148.5 to peace officers. This protection was only made necessary by judicial misinterpretation of the legislative intent as to Section 148.5.

Section 148.5 provides that making a knowingly false report to a peace officer or an employee of designated public agencies that a felony or misdemeanor has been committed constitutes a misdemeanor. The Court in *Pena* opined that the Legislature "did not intend citizens' complaints to a law enforcement entity concerning the conduct of that entity or its officers as envisioned under California Penal Code Section 832.5 to be within the definition of a police report for the purposes of Penal Code section 148.5." *Pena v. Municipal Court*, 96 Cal. App. 3d 77, 83, 157 Cal. Rptr. 584, 587 (1979). The Appellate Department of the Los Angeles Superior Court in *People v. Craig*, 21 Cal. App. 4th Supp. 1, 26 Cal. Rptr. 2d 184 (1993), relied heavily on *Pena* to reach a similar conclusion.

The two opinions, *supra*, obviously failed to properly interpret the Legislature's intent because the Legislature thereafter directly responded by enacting Section 148.6. The legislative history clearly establishes that the Legislature was seeking to overcome the decision in *People v.*

Craig, and its reliance on *Pena*. Significant is the fact that the Legislature did not amend Section 148.5 by expanding the definition of "reports" to include complaints made pursuant to Section 832.5. Had they done so, the amendment would have applied only to those circumstances where a crime is alleged to have occurred.

The following facts demonstrate the clear tie between Sections 832.5 and 148.6: (a) Section 148.6 was enacted as a *new* code section; (b) Section 148.6 applies only to a *knowingly false* allegation of "*misconduct*" made only against a peace officer; (c) Section 148.6 defines "allegation of misconduct against any peace officer" by specifically referencing Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code; and (d) Section 148.6 requires notice to the complainant referencing, among other things, the fact that California law requires the agency to have a procedure to investigate citizen complaints. This latter provision is obviously complimentary to Section 832.5, which is found within Chapter 4.5 of Title 3 of Part 2 of the Penal Code and mandates each department or agency that employs peace officers to establish a procedure for investigating citizen complaints against the personnel of *these* departments or agencies.

2. Section 148.6 Must Be Considered in Context With Its Companion Statutes.

In evaluating the constitutionality of a statute, a court should consider other statutes relating to the same subject, *in pari materia*. This rule applies where both statutes share the same purpose, even though they may have additional dissimilar objectives. *Walker v. Superior Court*, 47 Cal. 3d 112, 124 n.4, 763 P.2d 852, 859 n.4, 253 Cal.

Rptr. 1, 8 n.4 (1988). As the California Supreme Court has explained:

> It is a well settled rule that different statutes relating to the same subject are to be considered together. . . . When two or more statutes, whenever passed, relate to the same thing or the same class of things or to the same general subject matter, they are *in pari materia* and are to be construed as forming a unitary system and as one statute.

People v. La Barre, 193 Cal. 388, 391-92, 224 P. 750, 751-52 (1924) (internal quotations omitted). Consideration of statutes *in pari materia* is appropriate in ruling upon the constitutionality of a statute. *See, e.g.*, In re *Bacon*, 240 Cal. App. 2d 34, 55-56, 49 Cal. Rptr. 322, 334-35 (1966) (California Supreme Court rejected claim that Penal Code Section 409, failure to disperse, was unconstitutional on its face when read together with a statute *in pari materia* that lists the officers authorized to give the command to disperse), *disapproved on other grounds by* In re *Brown*, 9 Cal. 3d 612, 624, 510 P.2d 1017, 1024-25, 108 Cal. Rptr. 465, 472-73 (1973).

Section 148.6 is *in pari materia* with Section 148.5, since both share the purpose of preventing false reports to the police and the resulting diversion of police resources and unfairness to the person wrongfully accused. When the two sections are read together, it is clear that the legislative scheme is not a content or viewpoint-based restriction on speech, but is a coherent legislative scheme prohibiting false allegations that any person, peace officer or not, has committed a crime.

The statutory scheme of which Section 148.6 is a part is critical to its construction and, ultimately, its constitutionality. The Ninth Circuit illustrated the fact that Section 148.6 would punish the false complaint made by Respondent Chaker but would not punish similar false statements made by witnesses or officers during the investigation of that complaint. On that basis, the Ninth Circuit concluded that Section 148.6 unconstitutionally discriminates based upon viewpoint. Admittedly, false statements made *during an investigation* of a complaint of misconduct against a peace officer do not fall under Section 148.6, whether such statements are made by an officer, a witness, the complainant or *any other person*, and *regardless* of the "viewpoint" of such statements, i.e., in the Ninth Circuit's characterization, whether such false statements are critical *or* supportive of a peace officer.

The Ninth Circuit, however, has compared apples to oranges. The intent of Section 148.6 is to address a situation where a complaint of misconduct is filed, which necessitates the *initiation* of an investigation into that complaint. False statements in a complaint against a peace officer to a law enforcement agency initiate a *response* by that agency. § 832.5.

On the other hand, false statements made *during* an investigation would not necessitate any additional response, since an investigation would already be *ongoing*. While there may be other consequences from such false statements, like interfering, hampering, or side-tracking an investigation, the false statements do not, themselves, *cause* a law enforcement agency to deploy resources that it was not *already* using in the *already existing* investigation. The two situations are clearly not analogous. Section 148.6 focuses on a particular type of complaint, against a

peace officer, *because* such complaints are subject to the mandatory investigatory procedures of Section 832.5.

It is undeniably true that Section 148.6 only makes criminal an allegation of misconduct if the allegation is known to be false when made, is made against a peace officer and is *filed with the peace officer's employing agency*. It is also true that Section 832.5 is a statutory mandate directed solely to agencies or departments that employ peace officers and requiring that those agencies adopt procedures to investigate all citizen complaints against the agency's own personnel. Moreover, Section 148.5 applies to any false report to any peace officer regarding any felony or misdemeanor. § 148.5 (a).

Thus, if a report is of a crime and is made knowing the report to be false, it would fall within Section 148.5. Indirect and incidental beneficiaries of Section 148.5 and Section 148.6 are peace officers as well as any other member of the public who is falsely accused, but no more so than the public is the beneficiary of all laws that are enacted for the public's protection. The primary victim of the conduct proscribed by Sections 148.5 and 148.6 is the *agency* to which the false report is made and the public it serves.

Section 148.6 does not provide greater protection for one class of individuals than for another class. Allegations of misconduct are acted upon by law enforcement agencies because of the mandate of Section 832.5, a section that singles out peace officers for special scrutiny *to which other citizens are not subjected*. The diminution of a peace officer's rights and the consequent burden placed on the employing agency make Section 148.6 a necessary adjunct to Section 832.5.

Sections 148.5 and 148.6 do not single out peace officers for special protection; they afford the same protection to everyone a law enforcement agency is required to investigate. More importantly, they protect *the agency* from launching an investigation on the basis of an allegation known to be false, the false report of a crime, against all individuals, including peace officers. It must be remembered that *Pena v. Municipal Court* only held that an allegation of misconduct under Section 832.5 did not constitute a crime report for purposes of Section 148.5. It did not hold that a crime report falsely made against a peace officer could not be the basis of a prosecution under Section 148.5.

The primary responsibility of Sheriffs' departments, municipal police agencies and other law enforcement agencies is to enforce our criminal statutes. Apart from the requirements of Section 832.5, an agency rarely, if ever, will investigate observed or reported misconduct that *does not* involve a potential criminal violation.

The provisions of Section 832.5, while imposed on every law enforcement agency in the state, *require* a department to accept allegations of *misconduct* made against employees *of its own agency*, not against the employees or officials of another agency *nor* of the employees or officials of the governmental entity of which they are an agency. By placing the mandatory duty of investigating any complaints against its officers on an employing law enforcement agency, the Legislature has created a distinction as to peace officers. A misconduct allegation against peace officers, therefore, is placed on an equal footing, by Section 148.6, with an allegation of criminal conduct under Section 148.5 that is made against every other member of

society, including peace officers and public officials. Discipline resulting from allegations of misconduct against peace officers and the ensuing investigations may be greater than the penalty imposed following a criminal conviction of a non-peace officer in many instances. Again, it is submitted that a peace officer is merely an indirect and incidental beneficiary of Section 148.6. The real beneficiary is the agency and the public it serves.

The criminal violation of either of the two sections is not to redress a wrong done to the individual officer; rather, it is to redress the wrong done to society as a whole. The wrong consists of calling on the resources of an agency whose duty is to serve the public at public expense, whose resources are limited and should not be squandered pursuing allegations known to be false when made, and to protect all segments of society, in general, from allegations known to be false when made. Surely, no one can seriously suggest that public policy should promote the making of allegations, that a public agency is mandated to investigate, when the allegations are known to be false at the time of their making. To the contrary, public policy should discourage such conduct.

The two statutes proscribe the reporting of *allegations known to be false* at the time of their making. Section 148.6 does not chill First Amendment rights. It only chills the use of allegations, known to be *false* when made, to invoke the mandated investigative duty of a law enforcement agency. In this regard, Section 148.6 should not be viewed in solitude as though it were the only penal section applicable when an allegation known to be false is directed at a peace officer. When read in conjunction with the other provisions of Chapter 7 of Title 7 of Part 1 of the Penal Code, and in particular Section 148.5, it can be seen that

any allegation, known to be false when made, *that invokes the investigative authority of a law enforcement agency* is punishable as a crime.

The two sections, when combined, cover all situations wherein a law enforcement agency are *required* to investigate, and is the equivalent of a general statute that provides criminal sanctions for making a materially false statement as to any matter within the jurisdiction of a government agency, such as 18 U.S.C. Section 1001.

By the very terms of Section 148.6, it is applicable to only peace officers, as only allegations of misconduct made against an agency's peace officer employees are required to be investigated under Section 832.5, referenced in Section 148.6. In no other instance would a law enforcement agency have jurisdiction to investigate allegations of misconduct not amounting to a crime. In the absence of Section 832.5, there is no legal mandate for a law enforcement agency to use its comprehensive investigative resources to investigate allegations of misconduct.

The mandatory investigation requirements, therefore, justify any difference of treatment as to peace officers by Section 148.6. The Legislature created the mandatory complaint provisions in Section 832.5, et seq., and so the Legislature can also create applicable penalties as to *those* complaints, as distinguished from any other complaints which may be brought in wholly different contexts against wholly different public officials not subject to those mandatory provisions.

3. The Bases Set Forth in this Court's Opinion in *R.A.V.* Render Section 148.6 Constitutional.

Section 148.6 falls within the specificed bases articulated in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), for content or viewpoint discrimination, and, therefore, is not an impermissible regulation of speech based on viewpoint, as determined by the Ninth Circuit.[3] This Court determined in *R.A.V.* that there are specific bases for content or viewpoint discrimination with respect to proscribable speech. First, "[w]hen the basis for the content discrimination consistes entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388. Second, when a "subclass [of proscribable speech] happens to be associated with particular 'secondary effects' of the speech." *Id.* at 389. For the reasons set forth in detail *supra*, Section 148.6 satisfies these bases.

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[3] Amici discuss and apply *R.A.V.* without conceding that it governs the facts presented. As the California Supreme Court noted, "*R.A.V.* involved fighting words, not knowingly false statements of fact. . . . Arguably, knowingly false statements of fact, unlike fighting words, *are* in all respects worthless and undeserving of constitutional protection." *Stanistreet*, at 506 n.4 (internal citations omitted). In particular, the statute at issue in this matter does not impose any penalty on speech between individuals, as was the circumstance in *R.A.V.* In *R.A.V.*, the government was interjecting itself into speech expressed on private property between private individuals. Here, *knowingly false* speech officially communicated to the *government*, for the purpose of causing an *unnecessary investigation* to be initiated, is criminalized. In enacting Section 148.6, the State of California sought not to impact criticism of peace officers generally, but sought to restrict the use of a particular *mode* of criticizing such employees, namely official complaints as to the misconduct of peace officers *filed* with *law enforcement agencies employing* the officers. Knowingly false complaints against officers are directly contrary to the purpose of the complaint process.

First, the California Legislature sought to balance the mandatory investigation and retention requirements of Section 832.5 with the penalty for knowingly false complaints of misconduct set forth in Section 148.6. Section 148.6 applies only to peace officers because complaints against those individuals are peculiarly subject to the requirements of Section 832.5. Moreover, Section 148.6 does not impermissibly differentiate between complaints of misconduct as to unfavored subjects, but applies equally to all such complaints against peace officers. The California Supreme Court found that this basis was satisified and that analysis is discussed in detail *infra*.

In fact, the *R.A.V.* analysis contemplated a statutory proscription like Section 148.6. The *R.A.V.* Court specifically indicated that it was not considering "a prohibition of fighting words that are directed at *certain persons or groups* (which would be *facially valid* if it met the requirements of the Equal Protection Clause)." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992) (emphasis added). Section 148.6 does just what the *R.A.V.* Court indicated *was permissible*, namely prohibiting expression that is *not* protected by the First Amendment (fighting words in *R.A.V.* and knowingly false complaints in this instance) directed at certain persons, namely peace officers.

Contrary to the Ninth Circuit's characterization, there is no protected viewpoint being expressed in the submission of a knowingly false complaint against a peace officer. Even public officials may recover for defamation where "actual malice," i.e. *knowledge* or reckless disregard for the truth or falsity of the statement, is involved. Section 148.6 makes punishable speech that this Court has repeatedly held to be unprotected by the First Amendment, *knowingly*

false statements. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

In fact, Section 148.6 does not truly impact expression in any forum for expression, but, instead, prohibits the use of *governmental* resources to initiate an investigation by a law enforcement agency, based upon *knowingly false* information. Section 148.6 "does not 'give one group an advantage over another in the *marketplace of ideas*,'" as filing a complaint with a law enforcement agency cannot reasonably be construed as communicating in the "marketplace." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 91 (1st Cir. 2004) (emphasis added).

B. The Ninth Circuit's Opinion is Contrary to the California Supreme Court's Determination that Section 148.6 is Constitutional.

The California Supreme Court previously determined the constitutionality of Section 148.6 and its analysis is directly opposed to that of the Ninth Circuit's Opinion in this matter. *People v. Atkinson (Stanistreet)*, 29 Cal. 4th 497, 508, 58 P.3d 465, 471-72, 127 Cal. Rptr. 2d 633, 640 (2002). The California Supreme Court found that the bases for content or viewpoint discrimination, discussed *supra*, applied to Section 148.6. In coming to this ultimate conclusion, the *Stanistreet* Court specifically found that knowingly false statements applied with special force to peace officers. The *Stanistreet* Court concluded as follows:

> just as the government may criminalize only threats of violence against a specific victim, the President, so too may the Legislature criminalize only knowingly false accusations against a class of victims, peace officers. To complete the analogy, what the Legislature may *not* do is criminalize

> only knowingly false accusations of illegal racial profiling.

Id. at 509, 58 P.3d at 472, 127 Cal. Rptr. 2d at 641.

The *Stanistreet* Court's analysis further emphasized that the "subclass of proscribable speech [is] . . . associated with particular secondary effects of the speech." *Id.* (internal quotations omitted). The secondary effects are the mandatory investigation and record retention requirements. Such effects are *not* present with respect to knowingly false statements *supporting* peace officers.

In addition, the record retention requirements of Section 832.5 are significant. Complaints against peace officers and any reports or findings on complaints must be maintained by law enforcement agencies for at least *five years*, such records can be maintained in an officer's *personnel file*, and management is afforded access to the records. § 832.5 (b) & (c)(1). Even complaints determined to be *frivolous, unfounded* or *exonerated* must be maintained by the agency for the requisite period. § 832.5 (c). Perhaps most importantly, all such records may become public information and released as part of civil or criminal court proceedings.[4]

The *Stanistreet* Court also specifically found that "there was no realistic possibility that official suppression

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[4] When certain procedures are followed, documents relating to complaints against peace officers are subject to disclosure in state criminal proceedings. California Evidence Code § 1043; *Pitchess v. Superior Court*, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974). Moreover, citizen complaints may not be protected from disclosure, at all, in federal proceedings. *See Soto v. City of Concord*, 162 F.R.D. 603 (N.D. Cal. 1995); *Kelly v. City of San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987); *Hampton v. City of San Diego*, 147 F.R.D. 227 (S.D. Cal. 1993).

of ideas is afoot." *Id.* (internal quotations omitted). The Court indicated that the statutory scheme *favored* complaints against peace officers, by requiring that law enforcement agencies investigate such complaints, set out procedures for addressing such complaints requiring the retention of records relating to such complaints. Section 148.6 only targets *knowingly false* complaints, so that only complaints made with actual knowledge of their falsity are suppressed, not complaints of police misconduct on any disfavored subject. The *Stanistreet* Court concluded as follows:

> If a person wants to file a complaint in a way that forces an investigation, that person may not knowingly tell a factual falsehood. The Legislature may elevate the status of a category of complaints that are particularly sensitive – like those of misconduct against peace officers – and require their investigation and rentention of records, and at the same time penalize those who invoke that status with knowingly false complaints. No one has a constitutional right to make a complaint of misconduct knowing both that the complaint must be investigated and that it is false.

Id. at 510, 58 P.3d at 473, 127 Cal. Rptr. 2d at 642.

C. Penal Code Section 148.6 is Analogous to 18 U.S.C. Section 1001.

The Federal equivalent of Section 148.5 and 148.6, 18 U.S.C. Section 1001 (Section 1001), accomplishes exactly what Sections 148.5 and 148.6 accomplish acting *in pari materia*. This Court has reviewed, and upheld, application of Section 1001 on numerous occasions. In *Brogan v.*

United States, 522 U.S. 398 (1998), this Court considered whether the statute was violated with a false "exculpatory no" in response to questions posed by federal agents from the Department of Labor and the Internal Revenue Service. This Court did not share the cavalier attitude expressed by the Appellate Department of the Superior Court in *People v. Craig*, as to the degree of harm caused by such falsehoods. This Court stated as follows:

> Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very purpose of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. . . . Moreover, as we shall see, the only support for the "perversion of governmental functions" limitation is a statement of this Court referring to the possibility (as opposed to the certainty) of perversion of function – a possibility that exists whenever investigators are told a falsehood relevant to their task.

Brogan, 522 U.S. at 401-402.

With respect to Fifth Amendment claims, *Brogan* stated as follows:

> Whether or not the predicament of the wrongdoer run to ground tugs at the heart strings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. 'Proper invocation of the Fifth Amendment privilege against compulsory self incrimination allows a witness to remain silent, but not to swear falsely.' (citations omitted.)" The petitioner, Mr. Brogan, apparently lacked the temerity to assert a First Amendment violation.

Brogan, at 404-405.

Bryson v. United States, 396 U.S. 64 (1969), also involved an interpretation of 18 U.S.C. Section 1001. Bryson was convicted of falsely denying affiliation with the Communist Party in an affidavit filed with the National Labor Relations Board. Bryson claimed, among other things, that the applicable legal requirement violated his First Amendment rights. This Court declined to examine the constitutionality of the statute at issue, holding that it was irrelevant to the validity of petitioner's conviction under Section 1001, the general criminal provision punishing the making of fraudulent statements to the Government. *Bryson*, at 68.

Bryson adopted language from *Dennis v. United States*, 384 U.S. 855, 867 (1966):

> The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's fraud. It is not an action to enforce the statute claimed to be unconstitutional.

Likewise, Section 148.6 is designed to punish the setting in motion of an investigation through false and fraudulent statements. *See also, United States v. Knox*, 396 U.S. 77 (1969).

United States v. Rodgers, 466 U.S. 475, 498 (1984), involved a Section 1001 prosecution for falsely telling the FBI and Secret Service that his wife had been kidnaped and was involved in a plot to kill the President. This Court cited an earlier case which had concluded a 1934 amendment to

the section indicated a congressional intent to protect the authorized functions of government from the perversion by deceptive practices.

This Court observed as follows:

> The FBI is authorized 'to detect and prosecute crimes against the United States,' including kidnaping. 28 U. S. C. § 533(1). And the Secret Service is authorized 'to protect the person of the President.' 18 U. S. C. § 3056. It is a perversion of these authorized functions to turn either agency into a Missing Person's Bureau for domestic squabbles. The knowing filing of a false crime report, leading to an investigation and possible prosecution, can also have grave consequences for the individuals accused of crime. There is, therefore, a 'valid legislative interest in protecting the integrity of [such] official inquiries.'

Id. (internal citations omitted).

The California Legislature considered the fact that there are hundreds of *false* complaints of peace officer misconduct filed annually. For instance, a letter submitted in support of enactment of Section 148.6 from then-Los Angeles County Sheriff pointed out that misconduct complaints "often reflect unrelated grievance[s]. These vary from angry traffic violators sulking about a ticket to manipulative criminals who feel an allegation will divert attention from their own pending criminal charges." SENATE COMMITTEE ON CRIMINAL PROCEDURE, BILL ANALYSIS, 1995-1996, AB 1732 (Cal. 1995), <http://info.sen.ca.gov/pub/95-96/bill/asm/ab_1701-1750/ab_1732_cfa_950224_164410_sen_comm.html>.

Section 148.6 targets speech that is not protected by the First Amendment, *knowingly false* speech. It also constitutionally protects law enforcement agencies and peace officers from the mandatory investigation and records retention requirements in relation to such unprotected speech.

IV. CONCLUSION.

It is respectfully urged by Amici that this Court grant the Petition for Review in order to consider the constitutionality of California Penal Code Section 148.6 and reverse the Ninth Circuit's determination in this matter on this important issue. Sections 148.5 and 148.6, taken together, form a well thought out scheme to prevent statutes, intended to encourage legitimate complaints of police misconduct, from being used as a device to swamp law enforcement agencies with knowingly false allegations that will interfere with the obligation to devote scarce resources to investigating legitimate, sincere, well-intended allegations of misconduct and reports of crime.

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Respectfully submitted,

JONES & MAYER
MARTIN J. MAYER,
MICHAEL R. CAPIZZI, AND
KRISTA MACNEVIN JEE
Attorneys for Amici Curiae,
California State Sheriffs' Ass'n,
California Police Chiefs Ass'n &
California Peace Officer's Ass'n